THE

HINDU LAW

OF

ADOPTION,

BY

W. H. RATTIGAN, Esq.,

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Ancient
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BY

W. H. RATTIGAN, M.A., PH. D., F.R.S.L.,

(OF LINCOLN'S INN),

AUTHOR OF "LEADING EVENTS IN INDIAN HISTORY,"

"SELECT CASES IN HINDU LAW," ETC.

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TO

JAMES FITZJAMES STEPHEN, M. A., Q. C.,

LATE LEGAL MEMBER OF THE SUPREME

COUNCIL OF INDIA,

THIS TREATISE

IS, WITH PERMISSION, DEDICATED AS A TRIBUTE OF

PROFOUND RESPECT.

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INTRODUCTION.

PERHAPS there is not a more interesting subject in the whole field of Hindu Law than that of Adoption, and it is certainly one which very frequently engages the attention of our Indian Courts. Intimately connected with religion, and affording a ready means of perpetuating the name and prestige of ancient families,[1] it is a Law to which the Hindus are strongly attached. Thus even such powerful Princes as the Rajas of Cashmere, Puttyala, Kuppurthulla, and Chumba, regarded the permission to adopt as one of the greatest concessions which they had received from our Government; and so careful were they to have this power formally recognized, that they each solicited and obtained from the Governor-General special *Sanads*, or grants, conferring upon them and their successors the much coveted power of adoption in the event of failure of direct heirs.

A short treatise then, on a subject of such practical importance as the Law of Adoption, cannot be altogether devoid of utility, and the following pages I think will be found to embody the leading doctrines on the subject recognized by the principal schools of Hindu Law.

The two leading Sanscrit works on Adoption are the *Dattaka Chandrika* and the *Dattaka Mimansa*. The former

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[1] *Tagore Law Lectures* for 1870, ch. ix. p. 210.

is the production of *Dewanda Bhat,* the author of the *Smriti Chandrika,* and is the prevailing authority in Bengal; while the *Dattaka Mimansa* is the composition of *Nanda Pandita,* the author of a commentary on the *Mitacshara,* and is particularly respected in the Benares school. The latter is not so concise as the work of *Dewanda Bhat,* and from the author's extravagant affectation of logic, it is very tedious, and his arguments are not at all times consistent or to the purpose.[1] Where these works differ the other schools are more inclined to follow the *Dattaka Chandrika* than the *Dattaka Mimansa.*

I observe that Morley has fallen into some confusion as to the relative authority of these two famous works. At page ccxvii. of his Introduction to the second volume of his Digest, he remarks correctly enough, on the authority of Macnaghten, that where they differ the *Chandrika* is adhered to in Bengal and by the southern jurists, and the *Mimansa* is held to be the infallible guide in the provinces of Mithila and Benares. But at page ccxxii. he writes as follows: "In questions of "adoption the *Dattaka Mimansa* is preferred in Bengal "and in the south; the *Dattaka Chandrika* in Mithila "and Benares."

The main difference between the Bengal and other schools may be said to arise from the doctrine of *factum valet,* recognized and enforced by the former, but rejected by the others. The effect of this doctrine is to legalize an adoption which has once taken place as a matter of fact, although it may be altogether contrary to some express precept of law, for it is said, a fact cannot be altered by a thousand texts. In other respects, however, the differences are not very important, and, as Sutherland remarks in his preface, "it does not appear "that any set of dogmas has been enforced or opposed "as the peculiar doctrine of any particular school." In-

[1] Sutherland's preface to his *Translation,* p. ii.

deed, even in Bengal, the dangerous latitude allowed by the doctrine of *factum valet*, which if carried to its full extent, would render the whole body of Hindu law entirely dependent on the will of each individual Hindu, has in recent times, on more than one occasion, received judicial check. Thus in a Bengal case, in which an attempt was made to assert this doctrine, the late Mr. Justice *Dwakernath Mitter*, whose untimely death deprived the Judges of the High Court at Calcutta of a most able colleague, remarked as follows: "It is true that the "doctrine of *factum valet* is to a certain extent recog- "nized by the lawyers of the Bengal school; but if we "were to extend the application of this doctrine to the "law of adoption, every adoption when it has once "taken place, will be, as a matter of course, good and "valid, however grossly the injunctions of the Hindu "Shasters might have been violated by the parties con- "cerned in it." *Raja Upendra Lal Roy* v. *Srimati Ram Parasannamayi*, i. *Beng. L. R.* 221. It is impossible not to admit the force of these remarks, and the absurdity of permitting the very violation of a law to be set up as a legal ground for refusing to enforce that law is obvious. But patent as this absurdity appears to us it is distinctly sanctioned by *Jimuta Vahana* and other writers of the Bengal school; and, as I have already pointed out, the doctrine of *factum valet* is the distinguishing feature of that school.

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HINDU LAW OF ADOPTION.

CHAPTER I.

THEORY OF ADOPTION—DIFFERENT FORMS OF ADOPTION—WHO MAY GIVE OR RECEIVE IN ADOPTION.

Character of primitive society.

PRIMITIVE society, according to an eminent living jurist, was rather an aggregation of families than a collection of individuals. The family is in fact the type of an archaic society, and although founded on the notion of a common lineage existing between the several members comprising each family group, it was at the same time a constitution of a very artificial character. The very simple notion of persons being grouped together for political purposes according to local propinquity is one which was entirely alien to primitive society; and the process by which the early family groups recruited their ranks was by a purely artificial fiction closely simulating the reality of kinship. The strangers who were admitted into the family *feigned* descent from a common ancestor, and periodical meetings were held in which the ties of brotherhood were acknowledged and consecrated by common sacrifices. "The conclusion then," says Maine, "which is suggested by the evidence is, not that

"all early societies were formed by descent from the "same ancestor, but that all of them which had any per- "manence and solidity either were so descended or "assumed that they were. An indefinite number of "causes may have shattered the primitive groups, but "wherever their ingredients recombined, it was on the "model or principle of an association of kindred. What- "ever were the fact, all thought, language, and law "adjusted themselves to the assumption."[1]

Fiction of Adoption common to archaic communities.

The fiction then of creating family ties by the artificial mode of adoption is one of the earliest which the history of primitive society affords, and it is natural that we should find it carefully preserved in the jurisprudence of most nations of antiquity. It is natural also that since the circumstances which led to this fiction being resorted to were common to the necessities of all archaic communities, we should find a general analogy between the rules prevailing on the subject in different systems of ancient law.

Analogy between Grecian, Roman, and Hindu systems of Adoption.

Thus, the Grecian and Roman laws on the subject agree in many respects with the rules of Hindu law. Adoption was resorted to not only as a means of perpetuating a family name, but, what was even still more important, of preserving the due performance of the sacred rites of the family. "L'adoption," says the learned Demangeat, "paraît avoir été fréquemment "employée à Rome. Elle offre, en effet, au citoyen qui "n'a pas de fils un moyen de perpétuer son nom, et, chose "très-importante aux yeux des anciens Romains, un "moyen de prévenir l'interruption du culte des dieux "domestiques (*sacra privata*)."[2] Similarly amongst the Hindus, it is the belief that certain religious benefits are to be derived from male issue, that makes them so anxious to have a son living at their death; and the

[1] Maine's *Ancient Law*, ch. v. pp. 131, 132.
[2] *Cours Elémentaire de Droit Romain*, vol. i. p. 281.

fiction of adoption is consequently prized as a means of providing a ready substitute in case of failure of sons of the body. Nursed in credulity and superstition, the traditions of centuries inspire the orthodox Hindu with a reverent awe for the writings of those sages whose imperishable names date back to a period so far enveloped in antiquity, that chronology is unable to discover, with any degree of certainty, even the era in which they flourished.[1] *Manu*, the oldest of these sages, speaking with all the authority of one who was taught by *Brahmá* himself, enumerates the following means of rendering the human body fit for a divine state:—

"By studying the *Veda*, by religious observances, by "oblations to fire, by the ceremony of *Traividya*, by "offering to the Gods and Manes, by *the procreation of* "*children*, by the five great sacraments and sacrifices, "this human body is rendered fit for a divine state." (Chap. ii. sl. 28.)

In another passage he says: "By a son a man obtains "victory over all people, by a son's son he enjoys "immortality, and afterwards by the son of that grand-"son he reaches the solar abode." (Chap. ix. sl. 137.) In the next *sloke* he goes on to say: "Since the son de-"livers his father from the hell-named *Put*, he was "therefore called *Puttra* by *Brahma* himself." Although this derivation of the word *Puttra* is now generally admitted to be wrong, for it appears that the two words (*Put* and *Puttra*) have no original connection with

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[1] "We are lost," says Sir W. Jones, "in an inextricable laby-"rinth of imaginary cycles, *Yugas*, *Mahâyugas*, *Calpas*, and *Men-*"*wantaras*, in attempting to calculate the time when the first "MENU, according to the *Brâhmans*, governed this world, and "became the progenitor of mankind, who from him are called "*Mánávah*; nor can we, so clouded are the old history and chro-"nology of India with fables and allegories, ascertain the pre-"cise age when the work now presented to the public was actually "composed."—*Preface to the Institutes.*

each other;[1] the above texts are nevertheless important as showing that, to a certain extent, the very salvation of a Hindu in the future world was supposed in early times to depend on the circumstance of his having a son capable of performing his *shrad*, or exequial rites, at the time of his death. Indeed, regarded from a purely religious point of view, a *puttra* (or son) may well be said to be clothed with the character of "hell deliverer."

At the same time it should be observed that the original notion of the son delivering the father from torment through the performance of the *shrad*, or funeral rites, is not altogether consistent with the following text of *Manu*, in which he provides for the due performance of such rites on failure of natural heirs. "On failure of "all those (natural heirs) the legal heirs are such Brah- "manas as have read the three Vedas, as are pure in "body and mind, as have subdued their passions, and "they must consequently offer the cake; thus the rites of "obsequies cannot fail." (*Digest*, Book v. chap. iii. sec. i. verse 442.) For if the performance of these sacred rites can be effected with the same spiritual benefit by a Brahman possessing the required qualifications, if, indeed, such an individual could be found in the *kali yug*, there would seem to be no reason for attaching, as *Manu* does in other texts, the supreme importance to the birth of a son. Indeed *Nanda Pandita* tries to reconcile the texts by holding that, though the wife, and the rest, may perform obsequies, yet, these rites performed by them, are not so beneficial as those executed by a son. (Sec. i. verse 58. *Dattaka Mimansa*.) And, accordingly, in the next verse, he says: "Hence, for the acquisition of *some particular* "*heaven*, to be attained by obsequies performed by a son,

[1] See Judgment of Mr. Justice Phear in *Monemothonauth Day* v. *Onauth Nauth Day*, Bourke's *Reports*, 189. Wilson thinks the word may either be derived from *put* (पुत), the hell to which the childless are condemned, or from पूञ्, to purify. *Sanscrit Dictionary*, tit. *putr*. Benfey also suggests *pû* (to purify) + *tra*.

"the substitute for a son, is indispensable." In the earlier treatise by *Dewanna Bhat*, the "capacity of prolonging lineage" seems to be regarded as the chief object of affiliation, and is assigned as the material difference between a brother's son and the son of a co-wife—for the latter, as the issue of the husband, preserves the lineage of the step-mother, and therefore needs no affiliation; "but as the capacity of prolonging lineage "does not obtain in a brother's son, although such son "may exist; [he, or if any impediment exist, another,] "must be affiliated, as a son given, and so forth; there "is in this respect a material difference." (Sec. i. verse 26, *Dattaka Chandrika*.)

However, whether we regard the desire to have male issue in the purely secular view of providing for the perpetuation of a name and the continuance of a family, or whether we connect it with religious considerations, there can be but little doubt that it is a desire very strongly felt by the majority of Hindus even at the present day; and it is not surprising, therefore, that the fiction of adoption, devised by their ancient sages as one of the means of providing a substitute on failure of such male issue, should be as eagerly resorted to now as in more ancient times.

I have just spoken of adoption as *one* of the means devised by the old sages of providing a substitute, in default of sons of the body, for the due performance of religious rites, because in ancient times various other modes were permitted in which the relationship of father and son might be established.

Manu's list of sons.

Thus Manu enumerates twelve sorts of sons: "The "son begotten by a man himself *in lawful wedlock;* the "son of his wife, begotten in the manner before de-"scribed; a son given *to him; a son made or adopted;* "a son of concealed birth, or *whose real father cannot be* "*known;* and a son rejected by his natural parents; are "the six kinsmen and heirs. The son of a young

" woman *unmarried*, the son of a pregnant bride, a son " bought, a son by a twice married woman, a son self- " given, and a son by a *sudra*, are the six kinsmen, but " not heirs to collaterals." (*Institutes*, chap. ix. verse 159, 160.) But, as Sir William Jones points out in the " general note" at the end of his translation of the *Institutes*, " the learned Hindus are unanimously of opinion, " that many laws enacted by *Manu*, their oldest reputed " legislator, were confined to the three first ages of the " world, and have no force in the present age, in which a " few of them are certainly obsolete." Thus, of the several forms of adoption mentioned in ancient law books, those which are still found to be in force are, the *Dattaka*, *Dwyamushyana*, *Kritima*, and perhaps among the *Goswains* and other devotees who lead a life of celibacy, the *Kritra*, or son bought.[1] But even of these forms the first is alone regarded as orthodox, the second is almost obsolete, the third is only met with in the province of Mithila, and the fourth is highly reprobated, and is only resorted to by the classes above mentioned.

Forms of adoption recognized in present age.

Adoption as recognized by Hindu law involves a complete change of paternity, and in this respect the Hindu law agrees with the ancient Roman law as it existed prior to the modifications introduced by the legislation of Justinian, as well as with the Athenian law. In both the latter systems adopted children (called in Greek παιδεσθεται) were invested in all the privileges and rights of, and obliged to perform all the duties belonging to such as were begotten by their fathers; and being thus provided for in another family, they ceased to have any claim of inheritance and kindred in the family which they left.[2] This is precisely the effect of a Hindu adoption. From the moment that the child enters the

Adoption involves change of paternity.

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[1] Macnaghten's *Principles*, pp. 67 and 86.

[2] Potter's *Antiquities of Greece*, vol. ii. p. 336. Demangeat, *Cours Elémentaire de Droit Romain*, vol. i. pp. 286, 287.

adoptive father's family his connection with his natural parents ceases for ever, unless indeed he is adopted in the *Dwyamushyana* form, when he becomes the son of two fathers, but, as already pointed out, this form of adoption is seldom practised. With regard to marriage, however, the Hindu law, like the Roman,[1] maintains the incapacity arising from ties of blood, and accordingly prohibits the adopted son from marrying any kinswoman related to his father and mother within the prohibited degrees, because his consanguineal relation endures. Indeed, even with respect to the "sons of two fathers," a text of *Parijata* lays down that they "may not marry in either family."[2]

But incapacity to contract marriage in natural family is maintained.

Although there is in many respects a close analogy between the Roman and Hindu systems of adoption, it is still necessary to observe that a public character was always attached in ancient Roman law to so important an alteration in families as adoption. The sanction of the *curia* was necessary to its validity when the family of a member of the *curia* was affected. The *pontifices* would always interpose if there was any likelihood of the sacred rites of the family, from which the child was to be separated, becoming extinct.[3] The magistrates were authorized to inquire whether such adoption would be for the benefit of the infant, having regard to the circumstances in which both the child and the proposed adoptive father were respectively placed.[4] In the Hindu law, on the contrary,

Public character of Roman adoption.

In Hindu law father's power is unfettered.

[1] Justinian's *Inst.* lib. i. tit. x. i.

[2] *Dattaka Mimansa*, sec. vi. verse. 47, and Sutherland's *Synopsis*, Head iv. p. 219.

[3] Sandar's *Justinian*, p. 114. Maine's *Ancient Law*, ch. vi. p. 192.

[4] Per Lord Wynford in *Sutroogun Sutputty* v. *Sabitra Dye*, 2 Knapp's *Reps.* 289. Sandar's *Justinian*, p. 117. Demangeat, however, seems to consider that in the case of a Roman adoption, properly so called, the intervention of the magistrate was purely formal. "En somme," he says, "dans l'ancien droit et "dans le droit de Justinien, l'adrogation est précédée d'une espèce "d'enquête; et, d'après les resultants fournis par cette enquête,

no such tender care for the child's interests is felt, and the power of a father to give away his son is free and unfettered, except perhaps in the case of an only son, and even in the latter case the texts appear to me to be rather dissuasive than absolutely peremptory. Nor, again, is the son's consent at all necessary, and although his future prospects may be seriously injured by his transfer into another family, the law does not permit him to question the conduct of his father. The Athenian law allowed the child to renounce his adoption, but the Hindu law has no similar provision. In the *kritima* form of adoption, however, which is peculiar to Mithila, the assent of the adopted person, if he has attained majority, has been held to be necessary. (*Dungopal Singh* v. *Roopun Singh*, 6, S. D. R. 271. Sutherland's *Synopsis*, note viii. p. 224.)

Son's consent not required,

Except in *kritima* form.

Who may adopt.

Having thus shown the theory on which a Hindu adoption is based, we have next to inquire who are qualified to adopt and to give a child in adoption. Adoption being merely intended to provide a *substitute* in case of failure of male issue, the first general rule which may be stated is, that before a person can adopt he must be, to use the Sanscrit technical expression, *aputtra*, that is, sonless.[1] But whether this expression is

First general rule.

" l'autorité voit s'il convient ou non de permettre l'adrogation. " *Nous ne trouvons rien de semblable quand il s'agit de l'adoption* " *proprement dite.* Celle-ci a des conséquences moins graves : " *aussi ne paraît-il pas que le magistrat exerçât un pouvoir discré-* " *tionnaire et se refusât suivant les cas, à prononcer l'addictio au* " *profit du revendiquant.*"—*Cours Elémentaire de Droit Romain*, vol. i. p. 286.

[1] " The primary reason for the affiliation of a son," writes Mr. Sutherland in his *Synopsis*, " being the obligatory necessity " of providing for the performance of the exequial rites cele- " brated by a son for his deceased father, on which the salvation " of a Hindu is supposed to depend, it is necessary that the " person proceeding to adopt should be destitute of male issue " capable of performing those rites."—*Page* 212.

to be limited to a failure of *sons of the body*, or is to be extended so as to include the *representatives* of such sons, as well as the other substitute sons given in *Manu's* list, is a question which has given rise to some discussion. As regards the representatives of sons, it must be remembered that the word *puttra* is held to include not only the son, but also the grandson and great-grandson, on the ground that these, equally with the son, present oblations of food and preserve the line. (*Dattaka Chandrika*, sec. i. par. 6.) It is on a similar ground that the *Mitacshara* extends the right of representation to the great-grandson in matters of inheritance, and permits the grandson, in the absence of a son, to challenge unauthorized alienations of ancestral property on the part of the grandfather. (*Muddun Gopal Thakur* v. *Ram Buksh Pandy*, vi. Suth. W. R. 71, *Civil Rulings*; *Kantoo Lall* v. *Greedharee Lall*, iv. *ibid.* 469; *Mitacshara* on *Inheritance*, ch. i. sec. v. par. 9.[1]) It seems, therefore, clearly to follow that not only must the party wishing to adopt have no son of the body living at the time of adoption, but that there must also be a failure of the issue of such son in the male line as far as the great-grandson. It has also been ruled that the existence of an adopted son equally excludes the right of adopting a second son, a necessary consequence of the doctrine that

[1] See also *Viva Darnava Setu*, ch. xxi. sec. ix., translated by Halhed, where it is distinctly stated that—"He who has no son, "or grandson, or grandson's son, shall adopt a son, and while "he has one adopted son he shall not adopt a second;" and *Dattaka Chandrika*, sec. i. ver. 6. But, according to the better opinion, the existence of a daughter's son is no impediment to a valid adoption. The doubts on this point suggested by the author of the *Considerations*, seem to have arisen, as shown by Macnaghten, by the indiscriminate use of the word "grand-"son," which in English we apply with equal correctness to a daughter's son as well as to a son's son: whereas in Sanscrit, the word *putrikaputr* (पुत्रिका पुत्र) stands for the former, and *putr. putr* (पुत्रपुत्र) or *pautr* (पौत्र) for the latter.

an adopted son possesses the full rights and privileges of a son born. This point was decided by the Privy Council in the celebrated case of *Rungama* v. *Atchama*, iv. *M. I. App.* i., in which the original authorities as well as judicial precedents are examined into at great length.[1] Nor would any change of circumstance, such as the demise of the son first adopted, render the second adoption, effected in the lifetime of the former, a valid one. (*Basoo* v. *Camanah Basoo Chinna Venkatasa*, 13th Feb. 1856, *Madras Sadr Court Decisions.*) In a later case the same Court held that even an adoption made during the pregnancy of the wife of the adopter is void, it being of the essence of the power to adopt, that the party adopting should be *hopeless of having issue.* (*Narayana Reddi* v. *Vedachala*, 8th August, 1870; *M. S. A. Decisions*

Party must be hopeless of having issue.

[1] In the very recent case of *Gopee Lall* v. *Musst. Chundraolee Buhajee*, 30th November, 1872,—a note of which has been very kindly supplied to me by my friend Mr. Robert Campbell, one of the counsel engaged for the respondent,—the Privy Council affirmed the same doctrine. In this case one Damodurjee died leaving two widows, to each of whom, it was alleged, he had given power to adopt a son, by virtue of which the elder widow adopted the plaintiff's father, and the younger adopted one Luchmun, the successor of Damodurjee. The plaintiff claimed heirship to the deceased Luchmun as his nephew through these two alleged adoptions, whereby, as was contended, the said Luchmun and the plaintiff's father became brothers. Their lordships in rejecting this contention observed as follows: "The "question of successive adoptions was argued very elaborately, "and very carefully considered in the case of *Rangama* v. "*Atchama* and others, reported in the fourth volume of Moore's "*Indian Appeals*, p. 1, and since the decision of that case, what-"ever doubts may have been entertained on the question before, "it must be considered as settled law that a man cannot, while he "has an adopted son living, adopt another son. And in their "lordships' opinion it follows on principle that a man cannot "delegate to others, to be exercised after his death, any greater "power than he himself possessed in his lifetime; and that inas-"much as he Damodurjee could not, one adopted son being alive, "adopt another, his second widow Charmuttee could not by "virtue of any authority delegated from him adopt a son while "an adopted son was still living."

for 1860, p. 97.) Of course all that is meant by the expression *hopeless of having issue* is, that all probability of having a son must have passed, for *Manu* himself provides for a case where a *son of the body* is born subsequent to an adoption: "before proceeding to adoption," says *Sankha*, "the father must have fasted for a son." (*Vyavahara Mayukha*, ch. iv. sec. v. par. 8; *Dattaka Chandrika*, sec. i. par. 4.)

Argument in support of second adoption in lifetime of first adopted son.

The grounds upon which a second adoption effected in the lifetime of the first adopted son were sought to be supported in *Rungama's* case were:—

First, The text that "many sons are to be desired, "in order that one may travel to *Gaya*."

Second, "That he who has only one son is to be con- "sidered as childless."

But the text relied upon in the first ground, and which is ascribed to *Manu*, is nowhere found in the *Institutes*, and even on the supposition of its being genuine, it manifestly refers, as pointed out by Macnaghten, to legitimate sons. The second text refers, on the other hand, not to the person *adopting*, but to the person *giving* a child in adoption, and was intended to prohibit a father from giving away his only son, whereby he would render himself sonless.

Twin adoption invalid.

Notwithstanding the ruling of the Privy Council in the case of *Rungama* v. *Atchama*, above cited, a further attempt was made in Bengal in 1865 (in the case of *Monemothonauth Day* v. *Onauth Nath Day*, Bourke's *Reports*, 189, O. J.) to re-open the question as to the validity of double adoptions. The Privy Council's decision, it should be remembered, was passed on a Madras appeal, and was therefore not technically conclusive in cases arising in the Bengal Presidency, where the Hindu law differs in various respects from that prevailing in the southern peninsula. In the Bengal case, therefore, to which I refer, the contention was that a simultaneous adoption of two children was valid; and

this contention was based partly on the doubtful text of Manu that "many sons are to be desired in order that "one may travel to Gaya," partly on the authority of *Jugannatha*, a modern writer on Hindu law, and partly on certain old precedents of the Sadr Dewani Adalat of Bengal. But the exhaustive judgment passed by Mr. Justice Phear, of the Bengal High Court, in which the suit was heard in the exercise of its original jurisdiction, may be regarded as having thoroughly established the invalidity of such adoptions; and in *Bhya Ram Singh* v. *Agur Singh and others*, 10th September, 1866, Morgan, C. J. and Pearson, J. ruled that "the adoption of two "persons as sons at the same time is not only unusual, "but is not a practice sanctioned by Hindu law." (Vol. i. *N. W. P. High Court Reports*, 203.)

Disqualification of existing son to perform exequial rites removes bar to adoption.

Since, however, it is only the existence of sons who are competent to perform those religious ceremonies on which a Hindu's future salvation is supposed to depend, that constitutes a bar to a valid adoption, it would seem that the disability of a son, arising from his insanity or other valid cause, thus rendering him a disqualified person for the performance of exequial rites, would justify a subsequent adoption by the parent. It is true that this proposition has been doubted, but the high authority of Macnaghten[1] is in favour of the validity of an adoption effected under such circumstances; and for my own part, subject, of course, to the provisions of Act XXI. of 1850 against any disqualification arising simply from loss of caste, I fail to see any solid foundation on which any doubts on this subject can rest.

Females cannot be adopted.

The next general rule which may be stated is, that since adoption is a means of providing a substitute for a son of the body, it follows that *females cannot be adopted*.[2]

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[1] Page 69, note, "*Principles of Hindu and Mahommedan Law.*

[2] It appears, however, that in former times it was the practice to affiliate daughters in default of male issue; but, as Macnaghten adds, "the practice is now forbidden."—*Principles*, p. 87 and note.

This proposition seems so clearly to follow from the very nature and theory of adoption that it hardly needs any authority to support it; but Sir Edward East has reported a case in which the plaintiff claimed as the adopted daughter of a prostitute, and in which the opinion of the Court Pandit was taken, whether by the Hindu law, there could be an adoption of a female heir; to which the Pandit answered, that there was no such instance of the adoption of a daughter by the Hindu law. (*Doe Dem Hemcower Bye and another* v. *Hanscower Bye and Annundo Bye*, 1818. Montriou's *Cases on Hindu Law*, p. 553.) I observe, however, that in the case of dancing girls belonging to the prostitute class, the Sadr Court of Madras considered that *recognition as a daughter* was sufficient to constitute a valid title to inheritance. (*Venkatachellum* v. *Venkataswamy*, 25 April, 1856, *M. S. A. Decisions*, p. 65.)

Wife's consent unnecessary.

An adoption being intended for the spiritual benefit of the husband and his ancestors, the consent of his wife is not needed. The adopted son becomes a member of his adoptive father's family, and not of his mother's family, and although he can perform the *shrad* of his adoptive mother, he cannot perform that of his maternal grandfather. (*Tincouree Chatterjee* v. *Dino Nath Bannerjee*, iii. Suth. W. R. 49.) In the province of Mithila, however, a person adopted by the husband does not thereby become the adopted son of the wife, unless she joined in the adoption, nor does he succeed to her peculiar (or special) property, and *vice versa*. If the husband and wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to the estate of both. (*Sreenarain Roy* v. *Bhya Jha*, ii. *Select Reports, S. D. C.* 29.)

Except in province of *Mithila*.

Before proceeding to mention those persons who are by Hindu law either absolutely incapable of effecting a valid adoption, or who can only adopt under special circumstances, it is right to dispose of two cases which have formed the subject of authoritative judicial decision.

Adoption by widower.

The first case refers to the validity of an adoption by a widower. The only authority against such an adoption is that supplied by Mr. Justice Strange in his *Manual of Hindu Law*, § 61; but the author there quoted does not appear to have acquired much weight on points of Hindu law, and arrayed on the opposite side are such formidable writers as Sir Thomas Strange (vol. i. p. 65, ed. 1825); Sir W. Macnaghten (chap. vi. p. 69, new ed. note); Colebrooke (*Digest*, iii. p. 252); and Sutherland (*Treatise on the Law of Adoption*, appendix, note ii.) Such being the state of the authorities it is not to be wondered at that the High Court of Madras refused to set aside an adoption of this character. (*Nagappa Adapa* v. *Subba Sastry*, ii. *Mad. H. C. Reps.* 367.)[1]

The power of a leper to *give* or *receive* a son in adoption.

The next case involved the question whether a person being sick of leprosy could legally *give his son in adoption*.

No distinct authority could be cited by the counsel engaged in the case to support the negative side of this question, and the presiding judge, himself an eminent Hindu lawyer, the late Justice Shamboonath Pandit, ruled in favour of the adoption without the least hesitation. *Anund Mohun Mozoomdar* v. *Gobind Chunder and others*, Suth. *Reps. from January to July*, 1864, p. 173.

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[1] Mr. Grady doubts the correctness of this decision, and is of opinion that an adoption by one who is not a *Grihi*, or married man, is opposed to the policy of Hindu law. But since there is no express prohibition against such an adoption, and *Jugannatha* clearly admits its validity, I imagine the Courts would hesitate to act upon Mr. Grady's opinion. I may also point out that Mr. Grady is clearly in error when he says "the wife likewise "obtains spiritual benefit or exemption from exclusion from "heaven by the affiliation of a son" (p. 32, *Hindu Law*). I would refer him to a text of *Manu*, quoted in the *Dattaka Mimansa*, sec. 1, v. 29, in which it is distinctly declared that a "virtuous wife ascends to heaven though she have no child, if after "the decease of her lord she devote herself to pious austerity."

Right of leper to adopt.

The right of a leper to *receive* a son in adoption has also formed the subject of discussion, and Macnaghten reports two contradictory decisions, in the first of which the Pandit who was consulted declared that a person afflicted with leprosy is incompetent to adopt a son, for he bears the impurity till *death;* but in the second (No. xxi.) the opinion was to the effect that "after performance of the prescribed penance (the person afflicted with leprosy) becomes purified, and is competent to perform *Parvanu,* or double rites and ceremonies as declared in the *Veda;* therefore the adoption made by the person so purified is good and legal." The latter opinion is regarded by Macnaghten as the correct one, and Sutherland in his *Synopsis* (note iv.) remarks that the "admissibility of a doubt as to the legality of an adoption by such persons as those disqualified from inheritance is suggested with reference to a passage in the *Mitacshara* (sec. x. ch. ii. par. ii.), which declares that the specific mention of the 'legitimate son' and 'son of the wife' in a text of *Yajnyawalkya* (par. 9.), providing for the inheritance of such sons of disqualified persons, is intended to forbid the adoption, by them, of other sons. The author of the *Dattaka Chandrika* likewise arguing from the same or a parallel text, that an adopted son is not ordained for disqualified persons, excludes such son of those persons from succeeding to the estate of the paternal grandfather. In the absence, however, of other authorities, those alluded to can hardly be admitted as sufficient to establish a general rule vitiating *in toto* the adoption of one excluded from inheritance. In fact, the author of the *Dattaka Chundrika,* without advancing such a position, merely denies the right of one so adopted to inherit of his adoptive grandfather, and perhaps no more was intended by the author of the *Mitacshara.*" It should also be observed that the *Mitacshara* distinctly provides that in the case of disqualified persons, "if the de-

" fect be removed by medicines or other means " (such as penance and atonement, according to the commentator *Balam Bhatta*) " at a period subsequent to partition, the " right of participation takes effect, by analogy to the case " of a son born after separation." By parity of reasoning the removal of the defect in the case of disqualified persons by any of the ordained means would render valid a subsequent adoption, and the son so adopted would undoubtedly inherit the adopter's property. Since adoption requires the consent of the parties *giving* and *receiving* the child, it cannot obviously be effected by a lunatic, or person of insane mind.

A lunatic not able to adopt.

Widow's power to adopt.

A widow's power to effect an adoption varies in the different schools of Hindu law. Some schools, such as the Bengal and Benares, requiring previous authorization from the deceased husband, while others, as the Madras, consider the sanction of the husband's kindred sufficient. In the province of Mithila widows are permitted to adopt in the *kritima* form, without any previous sanction from the husband, so far at least as adoption affects the inheritance to their own special property.[1] In Bombay it appears that a widow may adopt, without the injunction of her husband, the son of her husband's brother, but not in any other case. (*Hulbut Rao Munkur* v. *Govind Rao Bulwunt Rao Munkur*, ii. Borr. 75.) Colebrooke remarks, on a case quoted at p. 92, vol. ii. Strange's *Hindu Law*, " The followers of the *Mitacshara* in " the Benares and Maharahta schools, admit the widow's " power of adoption without authority from her husband, " if she have the sanction of his kindred." But so far as the Benares school is concerned, this exposition of the law is decidedly opposed to both the original treatises prevailing in that school, as well as to decided cases.

Colebrooke's exposition of the Benares law as to widow's power opposed to authorities recognized by that school.

[1] Suth. *Synopsis*, note 5, p. 222. See also *Collector of Tirhoot* v. *Huropershad*, vii., Suth. W. R. 500; *Musst. Shibkouree* v. *Joogun Singh*, viii. *ibid.* 155.

Thus, so far back as 1816, it was decided by the Sadr Dewani Adulat of Bengal that, according to the Hindu law as current in Bengal and Benares, the husband's authority was essential to the validity of an adoption effected by a widow. The Pandits who were questioned on this subject returned the following answer:—

"It is written in the *Vira Mitrodaya* and *Sunskar* "*Kuos Toobha*, that it is lawful for a widow to adopt a "son without authority from her husband, provided she "obtain the consent of her husband's heirs; but as this "decision is overruled in the *Dattaka Mimansa*, a trea- "tise of greater authority, the adoption of *Pertaub Mull* "by *Ranee Bukht Konwur*, without authority from her "husband, *Raja Bheem Mull*, is illegal, and invalid under "the *shasters* current in *Goruckpore*, and such adoption "being illegal, the appellant, as heir of his father, *Per-* "*taub Mull*, cannot maintain any claim to the estate in "dispute."

And in support of this answer, after citing the text of *Vesistha*, quoted in the *Dattaka Mimansa*, "Let not a "woman give or accept a son unless with the assent of "her lord," they proceed to argue as follows: "It has "been argued that this text is applicable solely to women "whose husbands are alive, and not to widows, the wife "alone being under control of the husband; to this it is "answered, the word 'woman' is to be taken in a "general sense, and applied equally to a widow or to a "wife, both being under control, the widow under that "of the husband's kindred: to this it is urged in reply, "that a widow consequently may adopt a son with the "assent of her husband's relations, but such a doctrine "would be manifestly absurd, for if she could, with the "consent of her husband's kindred, adopt a son, the "word 'husband' must necessarily bear the sense of "kindred, which it does not, and a son so adopted could "not confer any benefit on the deceased husband, being "adopted without his consent, whereas a son adopted

" by a widow with the consent of her husband, is in truth " the son of her lord." (*Raja Shumsheree Mull* v. *Ranee Dilraj Kour*, ii. *Select Reps.* 216, new edition.)

Then again we have the authority of Macnaghten, who writes as follows: "It is an universal rule in Bengal "and Benares, that a woman can neither adopt a son, "nor give away her son in adoption, without the sanc- "tion of her husband previously obtained." (*Principles*, p. 85.) And lastly, to put the question beyond all controversy, we may refer to the case of *Raja Haimun Chull Singh* v. *Koomer Gunsheam Singh*, ii. Knapp, 203, in which the Lords of the Judicial Committee of the Privy Council distinctly referred to the decision of the Sadr Court in the case of *Raja Shumsheree Mull* and followed the doctrine therein laid down. Their lordships have still more recently, in an appeal from the *Agra Sadr Court*, affirmed the same doctrine, and ruled that the husband's authority must be strictly proved. It was also observed by their lordships that as the adoption is for the husband's benefit, so the child must be adopted to him and not to the widow alone; nor would an adoption by the widow alone, for any purpose required by the Hindu law, give to the adopted child, even after her death, any right to the property inherited by her from her husband. (*Chowdri Padam Singh* v. *Koer Udaya Singh*, 12 March, 1869, ii. *B. L. Reps.* 101, *P.C.*)

The same doctrine prevails in Bengal. Thus in *Janki Dibeh* v. *Suda Sheo Rai* the late *Sadr Court* of Calcutta decided that, as the widow had failed to prove the genuineness of the deed of permission which she had produced, the adoption made by her was consequently invalid. i. *Select Reps.* 262, new ed. See also Sutherland's remarks in a case decided in Zillah *Salem*, quoted in ii. Strange *H. L.* 84; the *Pandit's* answer in another case, *ibid*, 92; Macnaghten's *Principles*, pp. 84, 85; and Colebrooke's *Digest*, book v. ch. iv. section viii. cclxxii. The husband's authority is also requisite according to

the law applicable to *Behar*, the sanction of the husband's kindred being regarded as insufficient in the case of an adoption according to the *Dattaka*, or orthodox form. *Jai Ram Dhami and others* v. *Musan Dhami*, 14th January, 1830, v. *Cal. S. D. A. Reps.* 3.

Authority of husband's kindred sufficient in Southern India.

In Southern India, however, it has been authoritatively ruled by the Privy Council in the celebrated *Ramnad* case, that the sanction of the deceased husband's kindred is sufficient in the absence of express authority or express prohibition on the part of the husband himself.

At first sight many of the reasons adduced by their lordships for affirming this doctrine would seem to be equally applicable to other parts of India, and particularly to Benares, where several treatises, of acknowledged weight in the Southern Peninsula, are accepted as embodying correct expositions of the law. But a more careful perusal of the elaborate judgment will show that their lordships had no intention of unsettling the doctrine which has been steadily accepted in the provinces of Bengal and Benares for upwards of half a century; and that their lordships arrived at their decision with especial reference to certain authorities prevailing in the Madras presidency which are not held in repute in other provinces.

"The principal contest," say their lordships, "has been "upon the broad and general question, Whether by "Hindu law, *as current in what is known as the* DRAVIDA "*country* (wherein *Ramnad* is situate), a widow can "adopt a son to her husband without his express authority; "and if so, by whose assent that defect of authority must "be supplied. Their lordships think it will be con- "venient to consider, in the first place, how this question "really stands upon the authority of Mr. Colebrooke and "Sir Thomas Strange.

"Mr. Colebrooke's note on the *Mitacshara* (ch. i. "section ii. article 9), which has been much discussed,

" clearly involves three propositions:—1. That the " widow's power to receive a son in adoption, subject to " some conditions, is now admitted by all the schools of " Hindu law, except that of 'Mithila.' 2. That the " Bengal (or *Goura*) school insists that the widow must " have the formal permission of her husband in his " lifetime. 3. That some, at least, of the other schools " admit the adoption to be valid, if made by the widow " with the assent of her husband's kindred. The two " first propositions are admitted; but it has been urged " for the appellants, that on the true construction of this " note Mr. Colebrooke's authority for the last proposi- " tion is limited to the Mahratta school, in which the " treatise called the *Mayukha* is the predominant au- " thority. *Balambhatta,* however, whom he cites as an " authority for a power of adoption in the widow wider " even than that expressed in the third proposition, was " a commentator of the Benares school. And the several " notes of Mr. Colebrooke, at pages 92, 96, and 115 of the " second volume of Strange's *Hindu Law,* seem to their " lordships to show conclusively that he considered the " doctrine embodied in the third proposition to be com- " mon ' to the followers of the *Mitakshara* in the Benares " ' as well as in the Mahratta school,' and as such to be " receivable as the law current in the *Zilla Vizagapatam,* " which lies between the northern or *Andra* division of " the Dravida country.

" Again, Sir Thomas Strange's statement of the law " in his work, vol. i. p. 79, is clear and unambiguous. " He says: ' Equally loose is the reason alleged against " ' adoption by a widow, since the assent of the husband " ' may be given, to take effect, like a will, after his " ' death; and according to the doctrine of the Benares " ' and Mahratta schools prevailing in the Peninsula, it " ' may be supplied by that of his kindred, his natural " ' guardians; but it is otherwise by the law that governs " ' the Bengal Provinces.'

"Their lordships entertain no doubt that the term " 'the Peninsula,' as used here, and other passages by " the same author, denotes that part of India which is " south of the line drawn from Ganjam to the Gulf of " Cambay, and includes the whole of the *Dravida* dis- " trict. The learned counsel for the appellants, however, " appeals from Sir Thomas Strange as a text-writer to " Sir Thomas Strange as a judge, and cites his dictum " in *Pillai* v. *Pillai* as opposed to this passage. In that " case, Sir Thomas Strange, after citing the text of " *Vashista*, says: 'Hence it may be inferred what appears " 'confirmed by opinions of living Hindu lawyers, and " 'by every case of the kind we are acquainted with, " 'that the consent of the husband is indispensable to " 'adoption into his family.' But this passage does not " alter the view which their lordships have already ex- " pressed as to the effect of the matured authority of Sir " Thomas Strange.

" The precise question which is now under considera- " tion was not in issue in that case, where there was a " written authority from the husband, and where the " real issue was whether the widow could adopt a boy " not designated in that written authority.

" Again, the case was decided in 1801, at a time " when the ancient authorities of Hindu law were far less " accessible to an European judge than they have since " become.

" And Sir Thomas Strange, in his work composed " twenty years later, says of this very case of *Pillai* v. " *Pillai*, that it was discussed on comparatively imperfect " materials; that the public was not then possessed of " the extensive information contained in Mr. Colebrooke's " translation on the law of inheritance, and the treatise " on adoption, since translated by Mr. Sutherland, to say " nothing of the MSS. materials that came subsequently " into his own hands, and which had contributed largely " to every chapter of his work. There can, therefore,

" be no doubt that the passage in his book contains the " matured opinion of Sir Thomas Strange, and that it " must be treated as an authoritative declaration of that " opinion controlling his dictum in *Pillai* v. *Pillai*.[1]

" Having thus ascertained what was the opinion of " two of the highest European authorities upon this " question of the Hindu law current in the south of " India, their lordships have next to consider whether any " sufficient reason has been assigned for treating that " opinion as unfounded.

" The remoter sources of the Hindu law are common " to all the different schools. The process by which " those schools have been developed seems to be of this " kind. Works universally or very generally received " become the subject of subsequent commentaries. The " commentator puts his own gloss on the ancient text; " and his authority having been received in one and re- " jected in another part of India, schools with conflicting " doctrine arose. Thus the *Mitakshara*, which is univer- " sally accepted by all the schools, except that of Bengal, " as the highest authority, yielding only to the *Dayab-* " *haga* in those points where they differ, was a commentary " on the *Institutes* of *Yajnavalkya*, and the *Dayabhaga*, " which, wherever it differs from the *Mitakshara*, prevails " in Bengal, and is the foundation of the principal diver- " gencies between that and the other schools, equally " admits and relies on the authority of *Yajnavalkya*. In " like manner there are glosses and commentaries upon " the *Mitakshara*, which are received by some of the " schools that acknowledge the supreme authority of that " treatise, but are not received by all. This very point " of the widow's right to adopt is an instance of the " process in question. All the schools accept as authori- " tative the text of *Vashista*, which says, 'Nor let a " ' woman give or accept a son unless with the assent of

[1] Strange's *Notes of Cases*, 103.

" 'her lord.' But the Mithila school apparently takes " this to mean that the assent of the husband must be " given at the time of the adoption, and therefore, that a " widow cannot receive a son in adoption, according to " the *Dattaka* form, at all. The Bengal school inter- " prets the text as requiring an express permission given " by the husband in his lifetime, but capable of taking " effect after his death; whilst the *Mayukha* and *Kaus-* " *tubka* treatises, which govern the Mahratta school, ex- " plain the text away by saying that it applies to an " adoption made in the husband's lifetime, and is not to " be taken to restrict the widow's power to do that which " the general law prescribes as beneficial to her hus- " band's soul. Thus, upon a careful review of all these " writers, it appears that the difference relates rather to " what shall be taken to constitute, in cases of necessity, " evidence of authority from the husband, than to the " authority to adopt being independent of the husband. " The duty, therefore, of an European judge who is under " the obligation to administer Hindu law, is not so much " to inquire whether a disputed doctrine is fairly de- " ducible from the earliest authorities, as to ascertain " whether it has been received by the particular school " which governs the district with which he has to deal, " and has there been sanctioned by usage. For under " the Hindu system of law, clear proof of usage will out- " weigh the written text of the law. The respondent, " *Ramalinga*, insists that, tried by either test, the propo- " sition for which he contends will be found to be correct. " The industry and research of the counsel in the lower " courts have brought together a *catena* of texts, of which " many have been taken from works little known and of " doubtful authority. Their lordships concur with the " judges of the High Court in declining to allow any " weight to these. But the highest European authorities, " Mr. Colebrooke, Sir Thomas Strange, and Sir William " Macnaghten, all concur in treating as works of un-

" questionable authority in the south of India, the *Mitak-*
" *shara, Smiriti Chandrika,* and the *Madhavyam,* the two
" latter being, as it were, the peculiar treatises of the
" southern or *Dravida* school. Again, of the *Dattaka*
" *Mimansa* of *Nanda Pandita,* and the *Dattaka Chandrika,*
" two treatises on the particular subject of adoption, Sir
" W. Macnaghten says, that they are respected all over
" India; but that when they differ the doctrine of the
" latter is adhered to in Bengal, and by the southern
" jurists, while the former is held to be the infallible
" guide in the provinces of *Mithila* and *Benares.* The
" *Dattaka Mimansa,* by the author of the *Madhavyam,* is
" also recognized as of high authority in the south of
" India, by Mr. Ellis, in his note at page 168 of the second
" volume of Strange. Of these treatises the *Mitakshara*
" is silent on the point in question. The *Dattaka*
" *Mimansa* of *Nanda Pandita* (section i. articles 15 to
" 18, and articles 27 and 28), is opposed to the respon-
" dent's view of it; but it seems equally opposed to an
" adoption by a widow under any circumstances. The
" *Dattaka Chandrika* (section i. articles 31 and 32),
" allows a widow to give a son in adoption where her
" husband has not forbidden her to do so, implying his
" assent from the absence of prohibition. The *Smiriti*
" *Chandrika* also permits a mother to give her son if
" she be authorized to do so by an independent male.
" And it is argued that what these two last authorities
" lay down concerning a widow's right to give, must by
" parity of reasoning, be taken to be laid down concern-
" ing her right to receive a son in adoption. The *Mad-*
" *havyam,* if that term is confined to the *Parasara*
" *Madaviya* and does not embrace all the works of *Vidya*
" *Narayanswamy,* seems also to contain no direct deter-
" mination of the point in question, but the *Dattaka*
" *Mimansa,* of that author, clearly and explicitly declares
" the right of the widow to adopt with the authority of
" her father-in-law, and whatever kinsman of her hus-

" band may be comprehended under the *et cætera*. It " cannot therefore be said that the proposition laid down " by Mr. Colebrooke, and adopted by Sir Thomas " Strange, is not supported by at least one of the " original treatises of undoubted authority in *Dravida*.

" The *Dattaka Mĩmansa* of *Sri Rama Pandita*, who is " stated by the judges of the High Court to be an " authority very generally cited in the South of India, " also confirms the proposition.

" Their lordships have excluded from their consi- " deration of what is the positive law of *Dravida* the " peculiarly *Mahratta* treatises (the *Mayukha* and *Kaus-* " *tubha*); and also the *Vira Mitrodaya*, which is a treatise " of especial authority at Benares. It must, however, be " admitted that the fact of the reception of the doctrine " in question by schools so closely allied to that of *Dra-* " *vida* is in favour of the hypothesis, that it also obtains " in the latter and strengthens the authorities which " directly support that hypothesis.

" The evidence that the doctrine for which the re- " spondents contend has been sanctioned by usage in " the south of India, consists partly of the opinions of " Pandits, partly of decided cases.

" Their lordships cannot but think that the former " have been too summarily dealt with by the judges of " the High Court. These opinions, at one time enjoined " to be followed, and long directed to be taken by the " Courts, were official, and could not be shaken without " weakening the foundation of much that is now received " as the Hindu law in various parts of British India. " Upon such materials the earlier works of European " writers on the Hindu law, and the earlier decisions of " our courts, were mainly founded. The opinion of a " Pandit, which is found to be in conflict with the trans- " lated works of authority, may reasonably be rejected; " but those which are consistent with such works should " be accepted as evidence that the doctrine which they

" embody has not become obsolete, but is still received " as part of the customary law of the country. A con- " siderable body of these *futwahs* is collected in the " third part of what has been called throughout the " argument in this case, the 'Green Book.' It is not " necessary to consider whether they can all of them be " supported to the full extent of what they affirm. But " they show a considerable concurrence of opinion to the " effect that where the authority of her husband is " wanting, a widow may adopt a son with the assent of " his kindred in the Dravida country. The decided cases, " exclusive of those in the Bombay Presidency, which " may be taken to be governed by the *Mayukha*, are " certainly not many. But there is at least the case G., " decided by the late Sudder Court of Madras, and there " are the French cases, which ought not, their lordships " think, to be wholly disregarded, as recognition of the " law prevailing in the south of India. They are to be " relied on in this case as affording evidence of a long " continued series of opinions officially given, and judi- " cially received, which were adopted as the grounds of " decision, showing a continued and recognized existence " of a doctrine, which suffices to remove from the opinions " of the Pandits, in this case, every suspicion of being " opinions given to support the interests or judgments of " others. Against these authorities the appellants have " invoked that of the case 2 *Knapp*, p. 203. But what " was, in fact, decided by the very guarded judgment " delivered by the late Lord Wensleydale in that case? " It was that according to the native text writers, in- " cluding probably *Vastusla*, certainly including the " *Dattaka Mimansa* of *Nanda Pandita*, the authority of " the husband was requisite to a valid adoption; that " the strictness of the law had been in many districts, and " particularly in the *Mahratta* States, relaxed or modified " by local usage, but that it had not been established to " their lordships' satisfaction that relaxation had ex-

" tended to the particular district of *Etawah* in Upper " India. Disclaiming, therefore, the intention to decide " what was the law in other parts of India, their lord- " ships held that they could not say that the law in that " district did not require the direction of the husband in " order to the validity of an adoption, which it was " necessary for them to do in order to reverse the judg- " ment of the Court below. It is clear that that decision " was not intended to govern a case arising in the south " of India.

" Upon the whole, then, their lordships are of opinion " that there is enough of positive authority to warrant " the proposition that, according to the law prevalent in " the Dravida country, and particularly in that part of it " wherein this *Kamnad Zimindary* is situate, a Hindu " widow, not having her husband's permission, may, if " duly authorized by his kindred, adopt a son to him. " And they think that that positive authority affords a " foundation for the doctrine safer than any built on " speculations touching the natural development of the " Hindu law, or upon analogies real or supposed, be- " tween adoptions according to the *Dattaka* form, and " the obsolete practice with which that form of adoption " co-existed, of raising up issue to the deceased husband, " by carnal intercourse with the widow." (*Collector of Madura* v. *Mutu Ramalinga Sathupathy*, i. *Beng. L. Reps.* i. P. C.)

Kinsmen whose consent supplies the want of husband's express authority.

Having thus disposed of the preliminary question whether a widow in the south of India could adopt without her husband's authority, their lordships next proceeded to the question, " Who are the kinsmen whose " assent will supply the want of positive authority from " the deceased husband ?"

In undivided family.

" Where the husband's family is in the normal con- " dition of a Hindu family—*i. e.* undivided—that ques- " tion is of comparatively easy solution. In such a case " the widow, under the law of all the schools which

" admit this disputed power of adoption, takes no in-
" terest in her husband's share of the joint estate except
" a right to maintenance. And though the father of the
" husband, if alive, might, as the head of the family and
" the natural guardian of the widow, be competent by
" his sole consent to authorize an adoption by her, yet,
" if there be no father, the consent of all the brothers,
" who, in default of adoption would take the husband's
" share, would probably be required, since it would be
" unjust to allow the widow to defeat their interests by
Where widow inherits her husband's *separate* estate.
" introducing a new copartner against their will. Where,
" however, as in the present case, the widow has taken
" by inheritance the separate estate of her husband,
" there is greater difficulty in laying down a rule. The
" power to adopt where not actually given by the hus-
" band can only be exercised when a foundation for it is
" laid in the otherwise neglected observance of religious
" duty, as understood by Hindus. Their lordships do
" not think there is any ground for saying that the con-
" sent of every kinsman, however remote, is essential.
" The assent of kinsmen seems to be required by reason
" of the incapacity of women for independence, rather
" than the necessity of procuring the consent of all those
" whose possible and reversionary interest in the estate
Father-in-law's sanction sufficient.
" would be defeated by the adoption. In such a case,
" therefore, their lordships think that the consent of the
" father-in-law, to whom the law points as the natural
" guardian and 'venerable protector' of the widow,
No inflexible rule where father-in-law is not in existence.
" would be sufficient. It is not easy to lay down an in-
" flexible rule for the case in which no father-in-law is
" in existence. Every such case must depend upon the
" circumstances of the family. All that can be said is,
" that there should be such evidence of the assent of
Must neither be made capriciously nor from a corrupt motive.
" kinsmen as suffices to show that the act is done by the
" widow in the proper and *bonâ fide* performance of a re-
" ligious duty, and neither capriciously nor from a
" corrupt motive."

Nor can a widow effect a valid adoption where the deceased husband has either expressly or impliedly prohibited the exercise of such a power after his death. On this point the judgment, from which I have quoted so largely, proceeds:—

Widow debarred from exercising power where deceased husband has left a prohibitory injunction, express or implied.

"Again it appears to their lordships, that inasmuch as "the authorities in favour of the widow's power to adopt "with the assent of her husband's kinsmen, proceed, in "a great measure, upon the assumption that his assent "to this meritorious act is to be implied wherever he "has not forbidden it, so the power cannot be inferred "when a prohibition by the husband either has been "directly expressed by him, or can be reasonably de- "duced from his disposition of his property, or the ex- "istence of a direct line competent to the performance "of religious duties, or from other circumstances of his "family which afford no plea for a supersession of heirs "on the ground of religious obligation to adopt a son "in order to complete or fulfil defective religious "rites.".

Widow cannot adopt second son on the death of the first child, in the absence of special permission from her husband.

The text writers are again not agreed as to whether, in the event of the death of the son adopted by a widow with the sanction of her husband, she can resort to a second adoption. The *Dattaka Mimansa,* the leading authority on adoption in the Benares school, lays down that the second adoption would be invalid unless the widow received a conditional permission to that effect from her husband; but *Jagannatha* enforces a different doctrine, and affirms the validity of two successive adoptions by a widow who had only a single injunction, on the ground that the object of the injunction would otherwise be unattained. Such being the state of the original authorities the question came up for decision before the Sadr Court of Bengal in 1852, and after argument it was held, following the *Dattaka Mimansa,* that a widow could only legally adopt a second son on the death of the first child, when the husband's permission was in-

tended to extend to successive adoptions and was not restricted to a single act. "As it is a principle of Hindu "law," say the learned judges, "that without permission "no son can be adopted, it is a fair legal inference that a "second adoption on the death of the first child, when "the husband is no longer alive to grant permission to "adopt, cannot be valid." (*Gournath Chowdri* v. *Arnopurnu Chowdrain*, 27th April, 1852, *S. D. A. Reps.* 332.) This decision, which is strangely overlooked by Mr. Grady in both his treatises on Hindu law, may be said to have finally settled the question in accordance with the doctrine of the *Dattaka Mimansa*, so far at least as concerns the Bengal and Benares schools. On the Madras side, where the sanction of the husband's kindred has now been ruled to be sufficient in the absence of express permission or express prohibition from the deceased husband, it would probably be required that the widow should obtain the consent of her husband's kindred to each successive adoption.

In Madras sanction of husband's kindred probably necessary.

In those schools in which express permission is required from the husband to authorize adoption by a widow, the permission may be given in any form, and it may be verbal or written. (*Soondur Koomaree Debbea* v. *Gadadhur Pershad Tewaree*, 15th February, 1848, vii. *M. I. A.* 54, 64.)

Husband's permission may be given in any form.

The fact of the widow's minority has been held to afford no valid objection to an adoption effected under instructions from the deceased husband. (*Haradhun Rai* v. *Biswanath Rai*, ii. Macnaghten's *Precedents*, 180.) But whether a male minor can himself adopt is a question on which there has been considerable controversy. Pandit *Bharat Chander Shiromany*, the author of Commentaries on the *Dattaka Mimansa* and *Dattaka Chandrika*, says in his Synopsis to the former treatise, that "both male and female infants may adopt sons, infancy "not being a bar to the performance of religious rites." Baboo *Prosunno Coomar Tagore*, on the other hand, de-

Minor widow may adopt if duly authorized by husband.

Query as to male minor's power of adoption?

clares his opinion that "adoption by a minor is invalid, "since he cannot possess discretion, and any authority "of the kind given by a minor, like any testamentary "writing or verbal request made by him, is invalid, "according to Hindu law." This opinion is based on the ground that under the *Mitacshara* minority extends to the sixteenth year, and that "before attaining majority, "every act, whether worldly or religious, is prohibited, "*except the performance of obsequies, or of the like nature,* "which is especially enjoined by the *shastras,* and not "optional." This is no doubt true, but then is not adoption regarded by all text writers as a positive act of religion, incumbent on the fatherless Hindu who seeks to preserve his soul from the unknown torments of *Put?* There is certainly no text expressly *enjoining* adoption, but at the same time the act is one which is declared by all the ancient Hindu writers to be attended with certain spiritual benefits not otherwise obtainable; and it must be recollected that *Manu* himself declares that—"A son "of any description *must be anxiously adopted* by one who has none." (*Dattaka Mimansa,* sec. i. v. 9.) It can therefore, be scarcely regarded as altogether "an optional act," and the opinion of *Bharat Chandar Shiromany* seems to be more consistent with the religious obligations, which the law imposes upon every Hindu, of securing the due performance of the *shrad* (or exequial rites) of his ancestors. The learned author of the *Vyavastha Durpana* concedes the power of a minor to adopt, but couples it with the condition that should the adopter die before attaining majority, the adopted would only be entitled to maintenance. This opinion, however, seems even more untenable than the Baboo's, for by the act of adoption the child acquires all the rights and privileges of a son born, and it could hardly, I conceive, be argued that if a minor became the father of a son (a case not unfrequently occurring amongst Hindus) and died before majority—eighteen years under Act XL. of 1858—the

son would only be entitled to maintenance. Both reason and principle seem to require that where the adoption is itself legal, the adopted is entitled to all the rights which result from such an affiliation, the effect of which, it must be remembered, is to deprive him of all rights which he would otherwise have possessed in his own family.

Disqualified landowners bound to obtain sanction of Court of Wards.

In the case of infant landholders who are subject to the jurisdiction of the Court of Wards, Regulation x. of 1793, section 33, enacts that no adoption by such disqualified landowners is to be deemed valid without the previous consent of the Court of Wards; and it has been held by the Sadr Court of Bengal that it necessarily follows from the provisions of this regulation, that no *power* to adopt can be granted by such a person without the consent of the Court of Wards: *Musst. Anund Moyee* v. *Shib Chander Roy*. The very existence of this regulation, however, supplies an additional argument in support of the proposition that the Hindu Law permits a minor of sufficient discretion to adopt; for if an adoption by such a person was itself illegal, there was no need to enact that without the consent of the Court of Wards, no adoption by disqualified landholders was to be deemed to be valid.

Query, if widow is restricted in her selection of a child for adoption?

Assuming that the widow is in other respects authorized to adopt, is she subject to any and what restriction in making her selection of a child? The *Dattaka Mimansa* distinctly prescribes that *in default of a son the nephew has a right to be adopted to the exclusion of all others*, and this authority was followed in the case of *Ooman Dutt* v. *Kunhia Singh* (which arose in Zillah *Tirhoot*), iii. *Select Reports*, 192, new ed. But in *Musst. Luddea and another* v. *Koolla and Tunsookh*, i. *Punjab Record*, 3, the Judicial Commissioner of the Punjab accepted as correct Macnaghten's exposition of the law, "that the "injunction to adopt one's own *sapinda* (a brother's son "is the first), and failing them, to adopt one of one's "own *gotra*, is not essential, so as to invalidate the

"adoption in the event of departure from the rule." (*Principles*, p. 71.) The learned Colebrooke and Mr. Ellis were of the same opinion, as appears from their remarks on the case of *Prayaga Venkana* v. *Lachshemg*, ii. Strange's *H. L.* 102, in which the Pandit who was consulted considered "that while there was a possibility of "adopting a brother's son, another should not be pre-"ferred." On the whole we may accept as true "the "result of all the authorities" given by Sir Thomas Strange, "that the selection is finally a matter of con-"science and discretion with the adopter, not of ab-"solute prescription, rendering invalid an adoption of "one, not being precisely him, who, upon spiritual con-"siderations, ought to have been preferred." (i. *H. L.* 85. See also Morley's *Digest*, i. p. 18 note, and the case of *Haradhun Rai* v. *Biswanath Rai*, ii. Macnaghten's *Precedents*, 180.)

Result of authorities.

There is no precise period fixed by Hindu law within which a widow must exercise the power of adoption conferred upon her by the deceased husband. Each case must, therefore, depend on its own peculiar circumstances. Thus in *Gobind Soondaree Debia* v. *Jaggo Dumba Debia*, 29 May, 1865, it was held by the Calcutta High Court that a Hindu woman, taking no steps to adopt until the death of the last male member of her husband's family, forfeits her right to adopt, iii. W. R. 66. A case is, however, mentioned in East's *Notes* (No. x.) in which an adoption fifteen years after the husband's death was upheld; and in the celebrated *Ramnad* case, referred to above, the adoption did not take place till twenty years after the husband's death.

No prescribed limit within which widow must adopt.

It appears, moreover, that the widow need not adopt at all unless she pleases. According to Colebrooke, *passages of law recommend but do not enjoin adoption*, and in *Dyamoye* v. *Rasbeharee*, 29th September, 1852, *S. D. R.* p. 1001, Sir R. Barlow made the following important observations: "No precedent has been

Nor is she bound to adopt against her wish

" brought forward, nor text of the Shasters quoted in the " course of the argument, which decides authoritatively " that it is incumbent on a Hindu widow, though un- " willing, to adopt a son by order of her husband; nor " do I find any legal penalty, such as supersession of her " own rights as widow, by transfer of the estate to the " next heirs, or the like, attached to her non-compliance. " The delinquency involves moral guilt, no doubt affect- " ing the spiritual interests of her deceased husband and " those of his ancestors. But I must again ask, Does " the non-performance of a *moral duty* involve questions " of law and legal results, and can the courts compel " performance ?"

Widow's power to *give* a son in adoption.

As regards the widow's power to *give* a son in adoption, the *Mitacshara* seems to allow it without any previous authority from the husband (ch. i. sec. ix. par. 9); and the commentator *Balam Bhatta,* who belongs to the Benares school, distinctly concedes the power. But the Calcutta Sadr Court held in *Debee Dial* v. *Hur Hor Singh,* 29 December, 1828, iv. *S. D. Reps.* 320, that a widow was incompetent to give an *only* son in adoption as a *Dwyamushyana* without authority previously given by her deceased husband. In an earlier case the *Madras Sadr Court* held that she might give her *younger* son on obtaining the consent of father, brothers, &c. (*Arnachellum Pillay* v. *Jyasamy Pillay,* Case 5 of 1817, i. *Mad. Decisions,* 154.)

General principles stated by Sutherland.

Sutherland in his *Synopsis* extracts the following principles as best supported by authority :—

" 1st. That the father may give away his minor son " without the assent of the mother, though it is more " laudable that he should consult her wishes.

" 2nd. That the mother generally is incapable of such " gift while the father lives.

" 3rd. That she, however, on her husband's death " may give in adoption her *minor* son, and even during " the life of that person, in case of urgent distress and

" necessity. A man who had permanently emigrated, " entered a religious order, or become an outcast, being " civilly dead, would be regarded as virtually deceased."

As a child can only be given in adoption by one who exercises parental power over him, it follows that one brother cannot give another brother in adoption, for brothers stand on an equality. (*Cons. H. L.* 207, 208, and Strange's *Manual of Hindu Law,* sec. 97.) An uncle is also incompetent to give a nephew in adoption. (Strange's *Manual,* sec. 80.)

One brother incompetent to *give* another brother in adoption.

Uncle also incompetent.

CHAPTER II.

WHO MAY BE ADOPTED.

General principle.

THE general principle, as stated in the *Dattaka Mimansa*, is, that as a son is created by the act of adoption, "such a "person only is to be adopted, as with the "mother of whom the adopter might "have carnal knowledge." (Section v. verse 20.)

Adoption of daughter's or sister's son prohibited.

This restriction, however, is only applicable to the three superior tribes, *Brahmins, Kshettryas,* and *Vaishyas;* and accordingly among these tribes the adoption of a daughter's son and a sister's son is prohibited by a text of *Saunaka,* which, after ordaining the competency of a *sudra* (the fourth or servile class) to adopt such persons, adds: "For the three superior tribes, a sister's son is nowhere (mentioned as) a son." (*Dattaka Mimansa,* sec. ii. 74, 93; sec. v. 18.)

Except amongst *Sudras.*

Adoption of sister's son upheld by Privy Council.

An adoption of a sister's son, however, by a Hindu, who was declared by counsel to belong to the *Vaishya* caste, that is one of the three superior tribes, was upheld by the Privy Council in the case of *Ramalinga Pillai* v. *Sadasiva Pillai,* ix. *M. I. App.* 506; and following the authority of this decision the High Court of Bombay has recently upheld a similar adoption. (*Ganpatrav Vireshvar* v. *Vithoba Khandappa,* iv. *Bomb. H. C. Reps.* 130 *a. c. j.*)

And by Bombay High Court.

Effect of these decisions discussed.

But their lordships of the Privy Council appear to have rather assumed the validity of the adoption in the parti-

cular case before them, from the fact that the appellant's father had deliberately styled the respondent an adopted son, a designation which, to use the language of Lord Chelmsford, "if there were no adoption at all, or if the "actual adoption were for any reason legally invalid, the "respondent would of course not be entitled to." In fact, in the opinion of their lordships, it "amounted "to a complete admission of the whole title of the re- "spondent, both in fact and in law, and showed that the "objections which had been urged to his claim, in the "opinion of the appellant's father, who probably was well "acquainted with all the circumstances, and may be "assumed to have known the *Hindu* laws and customs, "had no foundation."

The same view of the effect to be attached to this decision was taken by the Madras High Court in the case of *Jivani Bhai* v. *Jivu Bhai*, ii. *Madras H. C. Reps.* 467, 468. "To avoid misapprehension," say the learned judges, "it is, however, necessary to state that we do "not consider the question settled by the case at ix. "Moore's *Indian Appeals*, p. 506, because, in the first "place, the parties in that case are clearly *Sudras* and "not *Vaishyas*,[1] and in the second, the judgment of the "Privy Council upon a point never raised in the court "below, as indeed it could not have been raised, went "upon admissions of the appellant's father, who would "have been acquainted with Hindu laws and customs, "and have been aware of the legal invalidity of the "adoption if there had been any. On the point of the "validity of the adoption of the son of a person with "whom the adopter could not have intermarried, there "will be found great conflict of opinion among the "Pandits, but none whatever upon the authorities.

[1] I observe that before the Privy Council it was admitted by counsel that both adopter and adopted were *Vaishyas*. See p. 511, vol. ix. of Moore's *Reports*.

"They are all perfectly consistent in declaring such "adoptions invalid."

In the well-known case of *Narasammai* v. *Balarama Charlu*, i. *Mad. H. R.* 420, Mr. Justice Holloway of the Madras High Court went thoroughly into this question, and reviewed the authorities at great length. "It is "admitted on both sides," says that learned judge, "that there is no judicial authority upon the subject, "so that the case is one of first impression, and must "be decided upon the principles of Hindu law, unless "it be shown that in the country of the parties that "law has been modified by customs which have received "judicial recognition. A very short experience will "suffice to satisfy any judge that a *pandit* will always "overcome a passage of Hindu law too stubborn for "other manipulation by the often baseless allegation "of custom; and in our judgment no custom, how "long soever continued, which has never been judicially "recognized, can be permitted to prevail against dis-"tinct authority. Now, the passage quoted at page "101, distinctly forbids the adoption of a sister's son by "one of the three higher classes, and the weight of the "prohibition is increased by the addition of the doctrine "that the sister's son may be adopted by a *Sudra*. Mr. "Sutherland, the greatest English authority on the sub-"ject (p. 223), lays it down as a fundamental principle "that the person to be adopted must be one with the "mother of whom the adopter could have legally inter-"married.

"*Nanda Pandita* lays it down in distinct terms that "the daughter's son is not such a reflection of a son as "can legally be taken in adoption, and the commentator, "*Dattaka Chandrika* (sec. ii. par. 8), defines the reflec-"tion of a son as the 'capability to be begotten by the "'adopter through appointment, and so forth.' It is "manifest that the sister's son is not such an one. (Sec-"tion v. par. 18, of the *Dattaka Mimansa*). 'For the

" ' three superior tribes a sister's son is nowhere (men-
" ' tioned) as a son ;' and again, ' prohibited connexion
" ' is the unfitness (of the son proposed to be adopted)
" ' to have been begotten by the individual himself
" ' through appointment (to raise issue on the wife of
" another).' There exists, therefore, the very highest
" opinions in favour of the illegality of such an adoption,
" and to these is to be opposed the extra-judicial opinion
" of a gentleman, doubtless of great eminence, but still
" a mere opinion.

"Mr. Justice Strange, in his *Manual*, lays it down,
" ' that usage has sanctioned the departure from the rule
" ' to the extent that there (the Madras Presidency) a
" ' daughter or a sister's son may be adopted.' In the
" former edition, at p. 17, sec. xcii., it was said, on the
" authority of extra-judicial proceedings of the Sadr
" Court, to prevail as an usage in south India, that is the
" *Dravida* country, and in sec. xciv., quoting the opinion
" of a *Pandit* of the Provincial Court of the Northern
" Division, it was stated that the usage did not prevail
" there. This passage has been altogether omitted in
" the later edition, perhaps on the authority of the opinion
" given by the senior *Pandit* in this very case. The
" Civil Judge has shown by an old map that the country
" in which he was administering this supposed custom
" was not the *Dravida* country; and there seems to us
" no doubt whatever that this is the case, and that the
" opinion of a *Pandit* of the Northern Division as to the
" non-existence of the custom there was certainly of much
" greater weight than a vague statement such as that
" contained in the opinion of the *Sadr Pandit*. *Dravida*
" is the *Tamil* country, and *Andhra* is the name for
" *Telingana:* it is true that the family of languages
" spoken in this presidency is called the *Dravidian*
" family, but this does not affect the meaning of the
" geographical terms.

"It is to be observed, too, that Mr. Ellis, a Sanscrit

" scholar, was himself not a *Telugu* scholar, although " profoundly versed in the Tamil language and customs.

" This is a case, then, in which it is sought to set up " a supposed custom which has never received the sanc- " tion of judicial authority against the express language " of the greatest authorities. We are strongly of opinion " that such customs cannot, even if proved to exist, " operate in a court of justice bound to administer the " law.

" More peculiarly is it the duty of the Court to uphold " a positive prohibition of the law, when that prohibition " is itself a logical deduction from the very nature of the " subject to which it applies. The whole theory of an " adoption is the complete change of paternity.

" For the purposes of this argument, the son is to be " considered as one actually begotten by the adoptive " father. He is so in all respects, save an incapacity to " contract marriage in the family from which he was " taken. It is not uninteresting to observe that the " same theory of relationship in the adoptive family was " adopted in the Roman law.

" *Item Amitam, licet adoptivam, ducere uxorem non* " *licet.*[1]

" We are unable, therefore, to agree that the text is " not pointedly prohibitory; and even if there had been " no such text, we are of opinion that, as being a logical " consequence of the very nature of an adoption, the " Court would be bound to decide that such an adoption " is invalid. The civil judge is not very correct in the " basis of the dilemma in which he has placed the widow. " He says that if not governed by the school which pre- " vails here, he must be governed by the Bengal school, " which would validate any act done, and the unmeaning " words, 'a fact cannot be altered by a thousand texts,' " are supposed to embody a principle which would

[1] *Inst.* lib. i. tit. x. 5.

"govern the case. It is clear, however, that by the "Bengal school of law, this transaction would, as an "adoption, be absolutely void.

"In treating this adoption as an alienation, we further "think the civil judge wholly unfounded. It is true that "a philosophical jurist of our own time has told us that "an adoption is in Hindu society a substitute for the "will, which is purely of Roman invention;[1] but to alter "the disposition of property made by the law, there "must be an adoption. This is not one. The result, "therefore, is the same as it would be if a man, capable "of disposing of property by will, had executed a docu- "ment which, from some defect, was not a will. It could "by no possibility be argued that the intent to alienate "being clear the attempting testator had actually alien- "ated."

Custom in favour of such adoptions.

While, however, there can be no doubt that daughters' and sisters' sons are not legally competent to be adopted, it is abundantly clear that in practice such persons *are* frequently adopted, and that general usage, except perhaps in the case of Brahmins, is in favour of such adoptions. (Strange's *Manual*, secs. lxxxviii. and lxxxix., and as regards the Punjab, *Maya Das* v. *Sawun*, ii. *Punjab Record*, 161.[2]) Nevertheless it may be reasonably questioned whether a custom of this kind, so utterly repugnant to the whole theory on which a Hindu adoption is based, should be countenanced by our courts. The prohibition to adopt the child of a woman standing towards the adoptive father in the prohibited degrees of affinity, is not merely dissuasive or optional, but rather of a strictly peremptory character. It certainly seems more reasonable, to quote the language of the Madras High

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[1] Maine's *Ancient Law*, 193.

[2] In Steele's *Law and Custom of Hindoo Castes*, it is said: "A daughter's son is sometimes adopted with the consent of re- "lations."—Page 183, new edition.

Court, "to uphold a positive prohibition of the law "when that prohibition is itself a logical deduction from "the very nature of the subject to which it applies." And accordingly, although it was held in one case by the late Sadr Court of Bengal, that even in the case of a *Brahmin* an adoption of a sister's son was valid (*Ram Chander Chatterjee* v. *Sumboochunder Chatterjee*, Mac. *Cons. H. L.* 167); a host of cases may be cited in which the superior courts in India have refused to recognize such adoptions. Thus the adoption by a Brahmin widow of her uncle's son was set aside by the Supreme Court of Calcutta on the ground that she could not be his mother unincestuously. (*Dagumbaree Dabee* v. *Taramoney Dabee*, Mac. *Cons. H. L.* 170.) The same principle was followed in *Kora Shanker Takoor* v. *Beebee Munnee*, East's *Notes*, case 20, i. Morl. *Dig.* 18; and *Lutchmeenath Rao Naik Kaleyah* v. *Musst. Bhina Baee*, 7. *N. W. P.* 441, 443.

Rule does not apply to *Kritima* adoptions.

In the province of *Mithila*, however, where the *Kritima* form of adoption prevails, the rule against the adoption of a daughter's or a sister's son does not apply. The *Kritima* son does not suffer any change of paternity, nor does he lose his rights of inheritance in his natural family. His connection with the adoptive father is of a purely temporary character, which in no way affects his position towards his natural parents, whose obsequies he continues competent to perform. There is accordingly no objection to the affiliation of a sister's son in this form. Indeed, the only necessary condition to the legality of the *Kritima* form of adoption, is equality of caste. (*Chowdree Purmesur Dutt Jha* v. *Hunooman Dutt Roy*, 6 *Beng. Sudr. Dewany Reps.* 192; *Ooman Dutt* v. *Kunhia Singh*, iii. *Select Reps.* 192, new edition.)

Prohibition against adoption of only son, or eldest son.

The next general rule is, *that the child must not be an only son, nor an eldest son.* This rule, insisted upon by *Nanda Pandita*, is based on the following text of *Sau-*

naka: "By no man having an only son (*eka-putra*), is "the gift of a son to be ever made. By a man having "several sons (*bahu-putra*), such gift is to be made, on "account of difficulty (*prayatnatas*)." (*Dattaka Mimansa*, sec. iv. verse 1.) It will be observed that in this text there is no allusion to the accepter; the prohibition being merely against the gift of a son. But, supported by a text of *Vasishta*, *Nanda Pandita* contends that, "Since the word 'gift' means the establishing "another's property, after the previous extinction of "one's own; and another's property cannot be esta- "blished without his acceptance; the author (*Saunaka*) "implies this also." (*Dattaka Mimansa*, sec. iv. ver. 3.) This extravagant argument is in keeping with the general style of the commentator, but surely the word "gift" used in *Saunaka's* text, means simply the *act* of donation; and the fact that the question to which *Saunaka* replied was, By whom is a son to be given? seems conclusively to show that the answer had only reference to the *giver*. In order to bear out his construction *Nanda Pandita* was compelled to alter the form of the question as if it related *to the qualification of the person to be affiliated*, but in the earlier treatise of *Dewanda Bhat* the question is perhaps more correctly stated to have been—*By whom is a son to be given?* (*Dattaka Chandrika*, sec. i. ver. 29); and this is the form which *Nanda Pandita* himself gives in ver. 7 of the same section. Indeed, the answer would be almost irrelevant to the question, as stated in the opening verse of section iv. of the *Dattaka Mimansa*, and as a further proof that the question simply concerned the capacity to *give* a child in adoption, it may be observed that after disposing of the father's power in this respect, *Nanda Pandita* next proceeds to deal with the mother's power of *gift*. (Verse 9, sec. iv.)

Reason of the rule.

The reason adduced by *Vasistha* for the prohibition against the gift of an only son is thus stated: "*For*

"*he is destined to continue the line of his ancestors.*" Upon which *Nanda Pandita* adds the following commentary: "His being intended for lineage, being thus "ordained; in the gift of an only son, the offence of "extinction of lineage is implied. Now, this is incurred "by both the giver and adopter also. For, the (reason "in question) is subjoined, after both (verbs, viz., "'give' and 'accept')." (Sec. iv. ver. 4, *Dattaka Mimansa.*)

But here again *Nanda Pandita* appears to have gone beyond what the words of *Vasistha* can fairly be interpreted to mean. *Vasistha* having pointed out the prohibition against the gift or acceptance of an only son, subjoins as a reason that such a son is "destined to continue the line of his ancestors;" in other words we might paraphrase his meaning as follows: "Let no "man give or accept an only son, because by doing so the "natural family would become extinct, and such a son is "specially destined to preserve the line of his ancestors." It is purely *Nanda Pandita's* own gloss to extend the extinction of lineage to both the giver and receiver, and it is remarkable that *Dewanda Bhat* does not adopt this construction in his treatise; on the contrary, he seems to restrict the consequential extinction of lineage to the *giver*. (*Dattaka Chandrika*, sec. i. ver. 30.) Moreover, on the theory of a two-fold extinction of lineage affecting both the giver and receiver, what position are we to assign to the child, the unfortunate victim of his father's transgression? For if the double extinction takes place by the mere fact of the adoption of an only son, as the *Dattaka Mimansa* declares would be the result, the child would necessarily be excluded from both his natural and his adoptive father's family. This consequence was either overlooked by *Nanda Pandita* altogether, or if perceived by him was one which he could not easily get rid of, and was therefore conveniently ignored. I am perfectly well aware that it has been

ruled, and no doubt quite correctly, that where an adoption is invalid, the boy retains his original position in his natural family (*Bawani Sankara Pandit* v. *Ambabay Ammal*, i. *Mad. H. C. Reps.* 363) ; but it will be seen that I am now dealing with the grammatical construction of a text, and the consequences which would result if the construction contended for by *Nanda Pandita* were adopted. As I understand that construction, the *immediate* consequence of an infringement of Vasistha's text would be the extinction of the lineage of both giver and receiver, and not simply that the adoption would be invalid without any ultimate consequences to the parties concerned in effecting it.

I am supported in my contention that the extinction of lineage, assigned as the fatal objection to the adoption of an only son, can only be logically advanced against the giver, and not against the receiver, by what appears to me some very formidable authorities, both native and European.

Jagannatha's opinion.

I shall first deal with the former. Thus *Jagannatha* says: "Let no man accept an only son, because he "should not do that whereby the *family of the natural* "*father* becomes extinct; but this," he proceeds to say, "does not invalidate the adoption of such a son actually "given to him." This opinion is approved of by the learned *Shama Churn Sircar*, the author of a very valuable treatise entitled *Vyavustha Durpana*, "For," he says, "if the giver give his only son in adoption, causing his "own lineage to become extinct, there is no reason why "the adoption of such a son should be invalid, though it "be a blameable act." (Page 983, *Vyavastha Durpana*, 2nd edition, and page 830, *Remark.*)

Shama Churn Sircar's opinion.

European commentators.

Passing now to the European writers, the honoured name of Macnaghten may first be cited. Having stated the rule of Hindu law that "the party adopted "should neither be the only nor the eldest son," he subjoins a foot-note, that "this is rather an injunction

" against the *giving* than *receiving* an elder or only son in " adoption, and the transfer having been once made, it " cannot be annulled." (*Principles*, p. 69, note, 1871 edition.) Sutherland also, himself the translator of the two leading Sanscrit treatises on adoption, considers the reason of the prohibition against the adoption of an only son to be the " Extinction of lineage to the *natural* " father." (*Synopsis*, p. 214.) Then we have Sir Thomas Strange asserting his conviction that " both " these prohibitions respecting an eldest and an only " son, where they most strictly apply, they are *directory* " only, and an adoption of either, however blameable in " the *giver*, would nevertheless, to every legal purpose, " be good." (Vol. i. p. 87.)[1]

Having now discussed the opinions of independent writers, both native and European, I shall next refer to judicial decisions, which, if not altogether consistent, will, I think, be found, on the whole, to support the adoption of an only and an eldest son.

Bengal decisions.

On the Bengal side may be cited *Nundram* v. *Kashee Pandee*, iii. *Beng. Sel. Reps.* 232; *Debie Dial* v. *Hur Hur Singh Singh*, iv. *Cal. S. D. Reps.* 320. In the latter case the power of a widow to give her only son in adoption when duly authorized by her husband, was conceded. And in *Sreemutty Joymony Dossee* v. *Sreemutty Siboosoondry Dossee*, i. Fulton, 75, Sir Edward Ryan, then Chief Justice of the Supreme Court at Calcutta, remarks as follows: " On the first point, the adoption of an only " son is no doubt blameable by Hindu law, but when " done, it is valid." Again, in *Musst. Tikdey* v. *Lalla Hurreelal*, 15 March, 1864, *Sp. W. R.* 133, decided by the Bengal High Court, Raikes, J., observes that,

[1] Steele says: " An only son may be adopted with the con- " currence of both parties, 10 C. P.; but such adoption seldom " takes place. K. D."—*Laws and Customs of Hindoo Castes*, p. 183, new edit.

" though it is allowed that a father should not give up " his eldest or an only son for adoption by another, we are " not shown any reliable authority on the illegality of " such selection when once made and acted upon."

Bombay decisions.

On the Bombay side the point under discussion may be said to be concluded by the comparatively recent decision of the Bombay High Court in the case of *Raje Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav*, 4 September, 1867, iv. *B. H. C. Reps.* 191, in which the question was distinctly raised and the adoption was upheld. Gibbs, J., in maintaining the adoption, remarked: " If " the adopted be not a proper person, the sin lies on the " giver and receiver alone ; but the adoption must stand."

Punjab decisions.

In the Punjab, also, the adoption of an only son has been maintained. (*Mukhun Lal* v. *Musst. Sukhea*, v. *Punjab Record*, 56.) In this case the judges differed as to the *legal* validity of such an adoption, Simson, J., ruling in favour of, and Lindsay, J., against the adoption. But both judges concurred in holding that the general custom of the country sanctioned such adoptions.

Madras decisions.

In southern India a long array of authorities could be cited affirming the legal validity of such adoptions, but I shall content myself with referring to the two most recent cases, viz.: *Chinna Gaundan and another* v. *Kumara Gaundan*, 10th November, 1862; i. *Mad. H. C. Reps.* 54; and *V. Singamma* v. *Vinjamuri Venkata Charlee*, 23rd November, 1868, iv. *Mad. H. C. Reps.* 171, in which C. J. Scotland's ruling in the former case was distinctly approved of.

As Chief Justice Scotland goes thoroughly into the legal aspects of the question, and utterly demolishes the objections urged against such adoptions in Mr. Justice Strange's *Manual of Hindu Law*, I can do no better than to quote his judgment, which is not very lengthy, and will well repay perusal :—

" This is a short point on which we may clearly come " to a conclusion. Two questions are raised :—

" *First,* did this adoption in point of fact take place? " *Secondly,* if so, was it valid in point of law? It is " admitted that the first question must be answered in " the affirmative. Then, as to the *second,* the only " authority produced is a passage from Mr. Justice " Strange's *Manual of Hindu Law.* Everything found " in that book is undoubtedly deserving of much respect; " but it must be observed that the passage in question " is not supported by any cited authority. And on " perusing it attentively, it is, I think, clear that the " learned author must have been dealing with religious " considerations strictly, and that when he says the " adoption of an only son is 'void,' he means void from " the orthodox theological point of the view of the çastras " and commentaries, and as being likely, in Hindu " belief, to entail painful consequences in *Put.* But we " are here to decide on temporal rights, not to consider " such spiritual liabilities; and the application of the " maxim *factum valet* to such a point as the present is " wise, I think, and justified by many authorities which " quite preclude our giving effect to the conclusion stated " in Mr. Justice Strange's Manual.

" 'The result of all the authorities,' says Sir Thomas " Strange,[1] 'is that the selection is finally a matter of " 'conscience and discretion with the adopter, not of " 'absolute prescription, rendering invalid an adoption " 'of one, not being precisely him who on spiritual con- " 'siderations ought to have been preferred.' And " again, with regard to both these prohibitions respect- " ing an eldest and an only son, where they most strictly " apply they are *directory* only, and an adoption of either, " however blameable in the giver, would, nevertheless, " to every legal purpose, be good, according to the " maxim of the civil law prevailing, perhaps, in no code " more than in that of the Hindus, *factum valet, quod*

[1] *Hindu Law,* 185.

" *fieri non debuit.*[1] Then there is the case of *Veerapermall*
" *Pillay* v. *Narain Pillay*, with those of the Rajah of
" *Tanjore*, *Arunachalam Pillai* v. *Ayyasami Pillai*, *Nun-*
" *dram* v. *Kashee Pandi*,[2] *Sreemutty Joymony Dossee* v.
" *Sreemutty Sibosoondry Dossee*, all of which are noted in
" the first volume of Morley's *Digest*, p. 17, and all of
" which support Sir Thomas Strange's doctrine.

" Referring to Mr. Justice Strange's argument, I may
" observe that it rests on the assumption that it is the
" birth or adoption of the son that delivers the natural or
" adoptive father from the danger of *Put*. But surely
" this is erroneous. It is the son's performance of his
" father's exequial rites, not his birth, or adoption, that
" relieves the father from the danger in question. Would
" the father after the birth or adoption of a son be con-
" sidered safe from *Put* if those rites were not performed
" owing to the son's death, his loss of caste, or for any
" other reason? If the mere birth of a son were all
" that was required, it would hardly be laid down, as it
" is,[3] that on the death of such son the affiliation of
" another is indispensable.

" Adoption takes place, according to *Atri*,[4] 'for the
" 'sake of the funeral cake, water, and solemn rites,' and
" according to *Manu*[5] for these objects, and also for the
" celebrity of the adoptive father's name. But not for
" the sake of the supposed efficacy of the mere act of
" adoption. If then the saving virtue is solely in the
" performance of the exequial rites, Mr. Justice Strange's
" doctrine of the total expenditure on the natural father
" of the efficacy of his son's birth does not seem to
" warrant his conclusion. The adopted son may well
" perform his adoptive father's rites, and in certain cases
" it appears, when he is a *dwyamushyayana*, those of his

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[1] *Hindu Law*, 87. [2] iii. *S. D. A.* 70; i. Morl. *Dig.* 17.
[3] *Dattaka Chandrika*, i. 5. [4] *Ibid.* i. 3.
[5] *Ibid.* and *Dattaka Mimansa*, i. 9.

" natural father also. It cannot, then, be said that the " adoption 'fails in its essential use,' and is for this cause " void. I may remark that the hostility shown in the " *Shastras* to the adoption of an only son arose, probably, " from other than mere religious considerations. The " true reason, perhaps, is furnished by *Jugannatha*,[1] who " lays down the law thus: 'Let no man accept an only " 'son, because he should not do that whereby the " 'family of the natural father becomes extinct;' but " this, he goes on to say, 'does not invalidate the adoption " 'of such a son actually given to him.'

" On the whole, the case is concluded by authority; " but I must say, with all possible respect for Mr. Justice " Strange, that upon principle and reason I should have " felt myself bound to decide the point in the same " way."

Were it not therefore for a recent decision of the Bengal High Court, to which I shall presently refer, it might well be said that the question of the validity of an adoption of an only son, was concluded by a remarkable *consensus* of judicial authorities. But this decision, pronounced as it was by a native judge of profound learning, re-opens the whole question, and compels the student of Hindu law to look to the Privy Council as the only tribunal by which the controversy can be finally set at rest. The difference of opinion which now prevails between the Bengal and other High Courts does not arise in consequence of any difference of authorities prevailing in the various schools, but to conflicting deductions from authorities respected by all schools alike.

Rajah Upendra Lal's case.

The decision to which I refer is that of the late Justice *Dwarkernath Mitter* in *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamy*, 1 *Beng. S. R.* 221, *a. c. j.* In this case the adoption of an only son was distinctly held to be invalid even in Bengal where the doctrine of *factum*

[1] 3 Coleb. *Dig.* 243.

valet prevails to the fullest extent; and the ruling of Scotland, C. J., in the Madras case above quoted, was entirely dissented from. "It appears," says Justice Mitter, "that the plaintiff was the only son of his "natural father, and as the adoption of an only son is "contrary to the Hindu law, the title set up by the "plaintiff must necessarily fail. That the adoption of an "only son is prohibited by the Hindu Shasters, is beyond "all controversy. The two leading authorities on the "subject, namely, the *Dattaka Mimansa* and the *Dattaka* "*Chandrika*, are unanimous in declaring that such an "adoption should never be made." The learned judge then cites the texts from these works which have already been quoted, and then proceeds: "The passages cited "above are sufficient to show that the adoption of an "only son is forbidden by the Hindu law. It has been "said that the prohibition contained in these passages "amounts to nothing more than a mere religious in-"junction, and that the violation of such an in-"junction cannot invalidate the adoption after it has "once taken place. We are of opinion that this con-"struction is not sound. It is to be remembered that "the institution of adoption, as it exists among the "Hindus, is essentially a religious institution. It origi-"nated chiefly, if not wholly, from motives of religion; "and an act of adoption is to all intents and purposes a "religious act, but one of such a nature that its religious "and temporal aspects are wholly inseparable. 'By a "'man destitute of male issue only,' says *Manu*, 'must "'the substitute for a son of some one description "'always be anxiously adopted, for the sake of the "'*funeral cake, water, and solemn rites.*'[1] It is clear, "therefore, that the subject of adoption is inseparable "from the Hindu religion itself, and all distinction be-"tween religious and legal injunctions must be neces-

[1] *Dat. Chand.* sec. i. verse 3.

" sarily inapplicable to it. Suppose, for instance, that a " son has been adopted by a childless widow without the " permission of her husband; the prohibition against " such an adoption is contained in the following passage, " 'Let not a woman either give or receive a son in " 'adoption, unless with the assent of her husband.'[1] " Can it be said that such an adoption would be valid in " law? It will be observed that the language employed " in the preceding text is precisely similar to that " employed in the text prohibiting the adoption of an " only son, and it would be difficult to suggest a reason " why an adoption invalidated in the one case for " temporal purposes, upon considerations arising out of " the religious view of the matter, should not be equally " invalidated in the other case upon similar grounds. " One of the essential requisites of a valid adoption is that " the gift should be made by a competent person, and " the Hindu law distinctly says that the father of an " only son has no such absolute dominion over that son " as to make him the subject of a sale or gift. (See " text of *Vishnoo* quoted in verse 5, section iv. of the " *Dattaka Mimansa.*) Such a gift, therefore, would be " as much invalid as a gift made by the mother of the " child without the consent of the father. It is to be " borne in mind that the prohibition in question is " applicable to the giver as well as to the receiver, and " both parties are threatened with the offence of 'extinc- " 'tion of lineage' in case of violation. Now, the per- " petuation of lineage is the chief object of adoption " under the Hindu law; and if the adoptive father " incurs the offence of 'extinction of lineage,' by adopt- " ing a child who is the only son of his father, the object " of the adoption necessarily fails. It is true that the " doctrine of *factum valet* is to a certain extent re- " cognized by the lawyers of the Bengal school; but if

[1] *Dat. Chand.* sec. i. verse 7.

" we were to extend the application of this doctrine to " the law of adoption, every adoption when it has once " taken place, will be, as a matter of course, good and " valid, however grossly the injunctions of the Hindu " Shastras might have been violated by the parties con- " cerned in it. The case of *Chinna Gaundan* v. *Kumara* " *Gaundan* (reported in 1 Stoke's *Reports*, page 54), is " no doubt in favour of the appellant; but, for the " reasons stated above, we are unable to concur with the " learned judges who decided that case.

" On the other hand, we find two cases in our own " Presidency which are directly in favour of the view we " have taken, and, what is of still greater importance, " both of these have been cited with approbation by " Sir W. Macnaghten himself. The first case is re- " ported in 178, vol. ii. of his work on the Hindu Law ; " and the second is to be found in page 179 of the same " volume. We may also observe that the learned trans- " lator of the *Dattaka Chandrika* and the *Dattaka Mimansa* " is of the same opinion.

" For the foregoing reasons we are of opinion that " plaintiff's suit must be dismissed, but without costs. " The late Rajah *had*, in point of fact, adopted the plain- " tiff; and if the title set up by the plaintiff has failed " it is for no fault of his."

Mr. Justice Mitter's decision discussed.

The above decision appears to be based on three grounds :—

1. That the institution of adoption is essentially a religious institution, and that therefore all distinction between religious and legal injunctions are necessarily inapplicable to it.

2. That the language employed in the text, prohibiting the adoption of an only son, is precisely similar to that employed in the text prohibiting adoption by a childless widow without the permission of her husband, which latter text has been uniformly held to be peremptory and not merely dissuasive.

3. That both the giver and receiver are threatened with extinction of lineage in case of violation of the rule.

It is undoubtedly true, that the fiction of a Hindu adoption is intimately connected with the Hindu religion, and that it originated in the superior importance attached to the performance by a son, or by one who bears the reflection of a son, of those sacred funeral rites, by which alone the mansions of the happy are attained. In the language of Manu, "A son of any description must be anxiously "adopted by one who has none, for the sake of the "cake, water, and solemn rites, *and for the celebrity of his "name.*"[1] (*Dattaka Mimansa*, section i. verse 9.) But, as I have already pointed out,[2] it is equally clear that the original notion of the spiritual efficacy of a son has in later times given place to the more secular motive of desiring a son for the purpose of insuring the continuance of the family.[3] The concluding clause of Manu's text itself mixes up this purely secular motive with the religious one of providing for the performance of certain solemn rites; and as *Manu* has elsewhere shown how these rites can be effected in the absence of a son and other natural heirs (*i. e.* by the intervention of *Brahmanas* versed in *Vedas*, and pure in body and mind, Colebrooke's *Digest*, ch. v. chap. iii. sec. i. verse 442), it is fairly open to contention, that, even in a strictly religious point of view, the Hindu who gives away his only son would not suffer any spiritual disadvantages, because the most ancient of all the sages, even Manu himself, has indicated the means whereby the failure of such rites can be prevented. The acute mind of *Nanda Pandita* perceived the inconsistency of maintaining on the one hand, the

[1] The concluding words of this text, which appear to me to have a very important bearing upon the question as to the degree of importance to be attached to the religious element in the rite of adoption, are omitted by Justice Mitter.

[2] *Ante* p. 4.

[3] Cowell's *Tagore Law Lectures*, 1870, pp. 210, 211.

supreme necessity of having a son "for the sake of the "funeral cake, water, and solemn rites," and in the next breath, as it were, providing for the due and effectual performance of those rites on failure of a son. And in order to reconcile this inconsistency, and maintain the importance of the religious element in adoption, he labours through fifty-nine paragraphs to prove that "for "the acquisition of some *particular* heaven, to be at- "tained by obsequies performed by a son, the substitute "for a son is indispensable." (Sec. i. verse 59, *Dattaka Mimansa.*) This "particular heaven" is certainly not mentioned by *Manu*, nor yet by *Dewanda Bhat;* and, however much we may be disposed to attach a certain authority to anything proceeding from the pen of *Nanda Pandita*, it may still, I think, be allowable, without incurring the charge of unwarrantable boldness, to remember that he is, after all, but one of many commentators; and when we find these commentators differing amongst themselves, we are surely entitled to test the soundness of their individual arguments. But even if it be conceded that *Nanda Pandita* is right, and that the prohibition in the matter of adopting an only son is based on purely religious grounds, it still appears to me to be very important, to use the language of the Tagore Law Professor, from whose able series of lectures I have derived the greatest assistance, "that the distinction "between religious and legal injunctions should not be "lost sight of, and that the theory should not be too "readily accepted that the religious and temporal as- "pects of any single doctrine or institution in Hindu "law, are altogether inseparable."[1] Mr. Cowell, however, the author whom I have just quoted, proceeds to say, that "prohibitions which amount to a denial of legal "right to do a particular thing are peremptory," and it is because he regards the texts concerning the adoption

[1] Cowell's *Tagore Law Lectures* for 1870, p. 310.

Prohibition extended by *Manu* to gift of eldest son,

And even of one of two sons.

of an only son to be peremptory, that he agrees with Mr. Justice Mitter in pronouncing such an adoption invalid. But it should be remembered that the same texts which prohibit the adoption of an only son, extend the prohibition to the eldest of several sons (*Mitacshara*, ch. i. sec. xi. verse 12); and have been interpreted by both *Nanda Pandita* and *Dewanda Bhat*, as even prohibiting the gift of one of two sons. (*Dattaka Mimansa*, sec. iv. verses 7 and 8, and *Dattaka Chandrika*, sec. i. verse 30). In both these cases the texts are as plain and emphatic as in the matter of an only son, and yet Mr. Cowell draws a distinction, and considers that while the adoption of an eldest son would be invalid, "the right to "give one of two sons cannot be denied, and the injunc- "tion of *Nanda Pandita* is, in the language of Mr. "Macnaghten, merely dissuasive, and not peremptory."[1] Macnaghten, however, regarded the injunction against the gift of an only son as merely affecting the giver and not the receiver, and he considered that such an adoption once made could not be annulled.[2] Moreover, there is an express decision of the Calcutta High Court, which Mr. Cowell, although he cites one to the same effect by the Madras Court, has failed to notice, that the adoption of an eldest son, though improper, is not invalid. (*Seeta Ram* v. *Dhunnuk Dharee Suhye*, 2 September, 1862, Hay's *Reps.* 260.) This ruling appears also to have escaped Mr. Justice Mitter, although it is somewhat remarkable that Mr. Mitter, who was then at the bar, appears to have been the counsel engaged to support the validity of the adoption.

But adoption of eldest son sustained by Bengal High Court.

Precepts against adoption unaccompanied by ceremonies.

Then again the Hindu law lays down certain forms to be observed, and prayers to be recited on the occasion of adoption, and *Nanda Pandita* gives it as the general conclusion to his section on the "Mode of Adoption,"

[1] Cowell's *Tagore Law Lectures* for 1870, p. 312.

[2] *Principles*, 1871 ed., page 69.

"that the filial relation of adopted sons *is occasioned only* "*by the proper ceremonies.* Of gift, acceptance, a burnt "sacrifice, and so forth, *should either be wanting, the filial* "*relation even fails.*" (*Dattaka Mimansa*, sec. v. verse 56.) In like manner *Dewanda Bhata*, after enumerating the different forms propounded by the sages, declares that "one of these forms is *indispensable.*" *Dattaka Chandrika*, sec. ii. verse 13. And *Manu* lays it down distinctly that "he who adopts a son without observing "the rules ordained, should make him the participator "of the rites of marriage, *not a sharer of the wealth.*" (*Ibid.* sec. vi. verse 3.) Now it is impossible to deny that these texts are as peremptory as any to be found in Hindu law, and that they are essentially based on religious grounds. But till the case of *Bhairab Nath Sye* v. *Mahesh Chandra Bhadury*, recently decided by the High Court of Bengal, and which I shall again allude to when treating on the subject of "religious ceremonies," it was the doctrine most generally approved of and sanctioned by *Jagannatha*, that actual gift and acceptance were alone sufficient to constitute adoption for civil purposes. Mr. Cowell thinks that this doctrine should still be maintained, because, to use his own words, "the Courts have always "declined to supervise religious ceremonials, or to insist "in any way on their performance. They are left, and "properly so, to the conscience of individuals, or to the "influence of the priests, or of the opinion of the caste or "community to which the parties belong. The weight "of judicial authority has never been thrown into the "scale to secure their observance or to prescribe their "necessity."[1] I am equally of opinion that the non-performance of the prescribed ceremonies should not invalidate an adoption which was otherwise unobjectionable; but if adoption is to be regarded as inseparably connected with religion, and "if its religious and tem-

[1] *Tagore Law Lectures*, 1870, p. 239.

"poral aspects are wholly inseparable," as Mr. Justice Mitter affirms, and to which doctrine Mr. Cowell seems to subscribe, then I must confess that it appears to me to be altogether inconsistent to hold one set of precepts as absolutely peremptory, and another set as merely dissuasive or not enforceable, because based on purely religious grounds.

Mr. Justice Mitter's second argument.

The second argument on which Mr. Justice Mitter bases his decision is, that the language employed in the text, prohibiting the adoption of an only son, is precisely similar to that employed in the text prohibiting adoption by a childless widow without permission of her husband, which is admitted on all sides to be peremptory. This argument at first sight seems very forcible, but I think a very satisfactory distinction between the two cases can be shown if we consider for a moment the theory on which the husband's consent is declared to be necessary in the case of an adoption by a widow. In such a case the widow simply acts as the agent of her husband; it is for the spiritual advantage of the husband and his ancestors that the adoption is effected;[1] and it is right, therefore, and perfectly intelligible, that before a widow can effect a valid adoption, one effect of which would be to divert the succession to the husband's property into a new channel, that she should show a proper authorization from her husband. If this were not so the result would be that a widow, whose power of alienating her husband's estate is confined within very narrow limits by the Hindu law, could easily deprive the reversionary heirs of their legal rights by adopting a son of her own accord, and

[1] It should be remembered that the existence of a son is not necessary to secure a Hindu widow's admission to Heaven, for *Manu* expressly declares: "Like those abstemious men, a virtuous "wife ascends to Heaven *though she have no child*, if, after the "decease of her lord, she devote herself to pious austerity." *Dattaka Mimansa*, sec. i. v. 29. See also *Chowdri Padam Singh* v. *Koer Oodey Singh*, 12 *Moor. I. App.* 550.

thus, in an indirect manner, do that which the Hindu law is careful to restrain her from doing, except under very special circumstances. It would be, in fact, to place a very wide power in the hands of a widow, altogether repugnant to the principles of the Hindu law in this respect. The prohibition in the case of a widow is thus based not simply upon religious grounds, but mainly, if not solely, with reference to the consequences which would ensue to the civil rights of others if her power of adoption were left uncontrolled. On the other hand, the prohibition against the adoption of an only son is essentially based on a religious injunction, not involving, so far as I can see, any prejudicial consequences to the civil vested rights of others.

Third argument.

The third and last argument is based on the supposed extinction of lineage of both giver and receiver, which I have already sufficiently dwelt upon when examining the original text of *Nanda Pandita.*

As regards the predecents relied upon by Mr. Justice Mitter, they consist of two cases from Macnaghten's *Precedents,* in one of which (No. 111, page 178), the question related to the validity of the adoption of an only son, while the answer returned by the *Pandit* was guardedly restricted to the illegality of *giving away* an only son. It is true, however, that in a foot-note, Macnaghten says: "The prohibitory injunction applies as well to the "giving as to the receiving." But opposed to this must be placed the more matured opinion of Macnaghten, as given in his *Principles,* in which he says: "The injunction "is rather against the giving than receiving an elder or "only son in adoption, and the transfer having been "once made, it cannot be annulled." [1] I observe that the *Precedents* were published at Calcutta in 1828, while the volume containing the *Principles of Hindu and Muhammadan Law* appears to have been published a year

[1] Page 69, note, 1871 edition.

later, or in 1829, so that we may be justified in concluding that the learned author had seen reason to alter his earlier opinion, and accordingly subjoined the note last referred to when speaking of the prohibitions contained in the texts of Hindu law against the adoptions of an only son. At all events, in the face of the passage I have quoted, and which appears to be the later one in point of date, not much stress can be laid on the opinion expressed in the *Precedents:* and it would have been more satisfactory if Mr. Justice Mitter had contrasted these conflicting opinions together and endeavoured, if possible, either to reconcile them or to show which was most correct, instead of simply referring to the one which supported his own view of the law, and omitting all allusion to the other, which was diametrically opposed to it. Again, it is singular that Mr. Justice Mitter entirely ignores the decisions of the late Sadr Court, of the Supreme Court, and of the High Court itself, to which I have already referred,[1] in which the validity of an only son's adoption was maintained. It is at all times to be regretted that judges of co-ordinate authority should discard the deliberate decisions of one another. But the evil is much greater when judges of the same court overrule doctrines affirmed by their predecessors, without even so much as alluding to such prior decisions. Mr. Justice Mitter also cites the authority of Mr. Sutherland, but here again the learned judge can hardly derive any support from this author: for the main ground on which the learned judge decides against the validity of an only son's adoption is, that by such an act of adoption extinction of lineage would result to both giver and receiver, whereas Mr. Sutherland, as I have already pointed out,[2] distinctly regards the reason of the prohibition to be the "extinction of lineage to the *natural* father." So that on the whole, while entertaining the most sincere respect

General conclusion.

[1] *Ante*, p. 46 *et seq.*

[2] *Ante*, p. 45.

for the authority of such an eminent native judge as the late Mr. Justice Mitter, especially on a question of Hindu law, I am still deliberately of opinion that the more correct doctrine in regard to the adoption of an only or an eldest son, is that affirmed by the Supreme Court in *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondry Dossee;* by the Calcutta High Court in *Musst. Tikdey* v. *Lalla Hurree Lall,* and *Seeta Ram* v. *Dhunnuk Dharee;* by the Bombay High Court in *Raja Vyankatrav's* case; and by the Madras High Court in *Chinna Gaundan's* case.

It only remains to notice a recent decision of the Privy Council, which, however, is not referred to, so far as I am aware, by any of the writers whose works I have cited above. The case to which I refer is that of *Nilmadhub Doss* v. *Bishumber Doss and others,* 13 *M. I. App.* 85. In this case the child, who was alleged to have been adopted by his uncle, was an only son, and it was contended that even if the adoption took place as a matter of fact, which was denied, the adoption was invalid. The exact construction of a *hibbanama,* however, was the substantial point at issue; and the Privy Council did not think the adoption was proved, inasmuch as in all transactions the child was described as the son of his natural father, and not as the son of his alleged adoptive father. But in dealing with the construction of the *hibbanama,* their lordships said that they preferred that construction which (to use the words of the judgment) "was most consistent with the "presumption that *Purmanund* did not commit a *breach* "*of duty* by giving away an eldest or only son." A mere *breach of duty,* however, is a very different thing from an act which is positively illegal; and while in the case of a disputed adoption it may be perfectly right when weighing the credibility of the evidence adduced by the parties to regard the presumption arising from the breach of even a religious or moral duty, the presumption in question cannot affect the validity of the adoption when the Court has once determined the issue of fact. In short, to

appeal once more to Macnaghten, "it by no means fol- "lows that because an act is prohibited it should there- "fore be considered illegal."[1] For these reasons I do not think the above case can be regarded as settling the question as to the validity or otherwise of the adoption of an only or an eldest son.

Third general rule. One of a different class cannot be adopted.

The third general rule relating to the qualification of the person to be adopted is, that *one of a different class or tribe or caste, cannot be adopted.* "Of all," says a text of *Saunaka,* "and the tribes likewise (in their own), "classes only; and not otherwise." (*Dattaka Mimansa,* sec. ii. ver. 74.) But the same sage afterwards ordains that "should one of a different class be taken as a son, "in any instance, let him (the adopter) not make him a "participator of a share." "Hence," says *Nanda Pandita,* "it is established, that one of a different class can- "not be adopted as a son." (*Ibid.* ver. 22.) *Katyayana* also declares that if the adopted son belongs to a different class he is "entitled to food and raiment only." (*Dattaka Chandrika,* sec. i. ver. 15.)

He is regarded as merely prolonging the line.

It appears, however, from *Dewanda Bhat's* treatise that the filial relation of one of a different class is not denied; and he cites the following text of *Yáska,* which explicitly declares, "A person of the same class must be "adopted as a son. Such a son performs the oblations, "and takes the estate; on default of him, one different "in class, who is regarded merely as prolonging the "line." (*Dattaka Chandrika,* sec. i. ver. 15.)

The above texts, defining as they do the exact position of a child adopted from a different class or tribe, can only be regarded as peremptory. The adopted child in such a case would be the unfortunate sufferer; for while the rite would be sufficient to establish filial relationship towards his adoptive father for the limited purpose of "pro- "longing the line," the texts of *Katyayana* and *Saunaka*

[1] Preface to *Principles.*

would disentitle him to anything beyond a claim for maintenance against his adoptive father. His connection with his natural family would of course be annulled by the act of affiliation. "Parted with by his parents, it "(the adoption) divests the child of his natural, without "entitling him to the substituted claims incident to an "unexceptionable adoption. Incompetent to perform "effectually those rites on account of which adoption is "resorted to, he cannot inherit to the adopter, but "remains a charge upon him, entitled only to main-"tenance." (Strange's *Hindu Law*, vol. i. p. 82.)

And is only entitled to maintenance.

The same rule is enforced in the *Kritima* form of adoption, and is, in fact, the solitary requisite for the validity of such an adoption.

Rule holds good in case of *Kritima* adoption.

The reason of the rule seems to be that since, in the present age, marriage with one unequal in class is prohibited, and since no one can be adopted whose mother the proposed adoptive father could not have married, adoption of one unequal in class must be necessarily invalid.[1] But the Madras Court has decided that the rules which prohibit marriage between persons of different classes are of no weight at the present day, and Mr. Cowell thinks that the same relaxation may safely be extended to adoptions in which persons of different classes are interested.[2] Opposed, however, to the Madras case, is one decided in Bengal, in which the late Mr. Justice Mitter ruled that the general Hindu law being against a marriage between persons of distinct castes, local custom could alone sanction such a marriage. In this case the marriage was alleged to have taken place between a *Dome* Brahmin and a *Haree* girl, and the High Court directed the Lower Court to find whether such a marriage was permitted by local custom. (*Ram Nudial* v. *Thanooram Bamun*, 11th May, 1868, ix. Suth. *W. R.* 552). Moreover, Sutherland

Reason of rule.

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[1] Sutherland's *Synopsis*, head ii. p. 213.

[2] *Tagore Law Lectures*, 1870, p. 326.

distinctly states that "in the present age, marriage with "one unequal in class is prohibited;"[1] and in Steele's work on *Hindu Castes* it is also said: "The parties must "be of the same caste, and different Gotr or family "stock."[2]

Where, indeed, it could be shown that custom permitted the marriage of a man with a woman of a different class, it might well be contended, bearing in mind the reason of the prohibitory injunction as above stated, that an adoption of a child of a different class would be equally valid; but in such cases the Courts would doubtless require very clear evidence of the existence of the custom.

Fourth general rule. Selection to be made from amongst *sapindas.*

The fourth general rule may be stated in the exact words of *Saunaka*: "*The adoption of a son by any* BRAH- "MANA *must be made from amongst sapindas,*[3] *or kinsmen* "*connected by an oblation of food; or, on failure of these* "*an* ASAPINDA, *or one not so connected, may be adopted,* "*otherwise let him not adopt.*" (*Dattaka Mimansa,* sec. ii. ver. 2.)

Brother's son to be preferred.

And, according to *Nanda Pandita,* who supports the doctrine by the authority of *Vijáyáneswara,* "Amongst "near *sapinda* kinsmen of the same general family, a "brother's son only must be affiliated." (*Dattaka Mimansa,* sec. ii. ver. 28.)

Not rigidly enforced.

But it is generally agreed that at the present day neither of the above injunctions are so essential as to invalidate an adoption in the event of departure from the rule.[4]

Fifth general rule. Age of adopted.

The fifth rule concerns the age of the child to be adopted, and on this question neither the original autho-

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[1] *Synopsis,* head ii. page 213.

[2] Page 163, new edition.

[3] Kinsmen extending to the seventh degree.

[4] Macnaghten's *Principles,* p. 71, new ed. See also *Tagore Law Lectures* for 1870, p. 327.

rities on adoption nor decided cases are altogether consistent.

A passage which is attributed to the *Kalika Purana* (the authenticity and meaning of which are contested), ordains that "after their fifth year sons given are not "sons."[1] And *Jagannatha* considers that this text constitutes an absolute prohibition against any adoption whatsoever of one whose age exceeds five years, or on whom the initiatory rite of tonsure may have been performed. (Colebrooke's *Digest*, book v. ch. iv. sec. viii. ver. 273.) But the Bengal Sadr Court ruled, in a very early case, in accordance with the opinion of the *Pandits*, that adoption of a boy above five years of age, though the selection be not laudable, is valid, provided the initiatory ceremonies (*Sanskar*) have been performed in the family of the adopter, and not in that of his natural father. (*Kerut Narain* v. *Musst. Bhoobunesree*, 1 *Sel. Reps.* 213, new edit.) In this case the boy was eight years old, but it appeared that tonsure and other initiatory rites had been performed by the adoptive father.[2]

Kalika Purana restricts age to five years.

It was ruled, however, by the late Supreme Court of Bengal that the fact of tonsure having been performed in the natural family creates no bar to a valid adoption, because, as Ryan, C. J. pointed out, "after performance, "a sacrifice to fire, even amongst the three first classes, "may be resorted to, and this will undo its effects." *Sreemutty Joymony Dossee* v. *Sreemutty Siboosoondry Dossee*, 1 Fulton, 75. So also in *Ram Kishore Acharj Chowdri* v. *Bhoobunmoyee Debia Chowdrain*, 7 March, 1859, *S. D. Reps.* 229,[3] it was held that although the plaintiff

Tonsure in natural family creates no bar to adoption.

[1] *Dattaka Mimansa*, sec. iv. verse 22.

[2] According to the *Jain Shasters*, the age qualifying for adoption extends to the thirty-second year. *Maharaja Govindnath Roy* v. *Gulalchand*, 25 March 1823, *V. S. D. Reps.* 276. See also Steele's *Law and Custom of Hindu Castes*, p. 182, new ed.

[3] This case was appealed to the Privy Council, and the decision of the Madras Court was reversed, but on grounds unconnected with the age of the adopted son, *v. M. I. Ap.* p. 165.

was near twelve years of age at the time of his adoption, and the ceremony of tonsure had been performed in his natural family, yet as he had not been invested with the thread previous to his adoption, the adoption was valid. In this case, however, the boy was the nephew of his adoptive father, and the court proceeded on the authority of the Madras case of the *Raja of Tanjore* (i. Morl. *Dig.* 22, 87), in which it was laid down that "an adoption is "good though the adopted should have passed his fifth "year at the time, and have undergone the ceremony of "purification by tonsure provided he be a *Sagotra* or "descended in a direct male line from a common male "ancestor, or that he be the son of a near relation on the "paternal side of the adopter."

Sutherland's opinion.

Sutherland has also added the weight of his authority to the correctness of the proposition that neither the fact of a boy's age exceeding five years nor of the ceremony of tonsure having been performed in his natural family, would render him unfit for adoption.[1] And he has also successfully shown that despite some inconsistencies, both the *Dattaka Mimansa* and *Dattaka Chandrika* support this doctrine. (Note xi. *Synopsis*, p. 225.)

Performance of *Upanayana* in natural family unfits a person for adoption.

It is quite certain, however, that a boy once initiated in *Upanayana*, or investiture of the sacred thread in his natural family, is thereafter rendered incapable of adoption; and this ceremony may be postponed in the case of a *Brahmin* until sixteen years after the date of conception; twenty-two years after the same date in the case of a *Kshatriya;* and after twenty-four years in that of a *Vaisya*. (Macnaghten's *Precedents*, p. 76; Sutherland's *Synopsis*, Head ii. p. 217.) *Ranee Seevagamy Nachiar* v. *Streemathoo Heraniah Gurbah*, in which the Madras *Sadr Adalat* held that a child could be adopted from the twelfth day after his birth to the day of *Upanayana*, or investiture with the sacred thread, and

[1] *Synopsis*, Head ii. pp. 215, 217.

this decision was upheld by the Privy Council. See also *Venkatasaiya* v. *Venkata Charlu*, iii. *Mad. H. C. Reps.* 28.

In case of *Sudras*.

In the case of *Sudras* adoption may take place at any time before marriage. *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoondry Dossee*, i. Fulton, 75; *Ranee Nitro Dayee* v. *Bholanath*, *S. D. R. for* 1853, p. 553; *Chetti Colum Prusunna Venkatachella Reddiar* v. *Chetti Colum Mudu Venkatachella*, case No. 7 of 1823, i. *Dec. M. S. A.* 406. See also i. Strange's *Hindu Law*, p. 91; *Vyavastha Durpana*, pp. 856, 862; and Macnaghten's *Principles of Hindu Law*, p. 75. But in a recent case the High Court of Bombay upheld the adoption of a married *Sudra* of mature age. *Raja Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav*, iv. *H. C. Bombay, Reps.* 191 a. c. j.

Orphan cannot be adopted.

Inasmuch as to constitute a valid adoption there must be a giving as well as receiving, it has been held by the Madras High Court, contrary to a case in i. Strange's *Notes of Cases*, 91, that an orphan cannot be adopted. *Subbaluvammal* v. *Ammakutti Ammal*, ii. *Mad. H. C. Reps.* 129. This decision has been followed by the Bombay High Court in *Balvantrav Bhaskar* v. *Bayabai*, 20 August 1869, vi. *R. H. C. Reps.* 83, o. c. j.

CHAPTER III.

THE EFFECTS OF ADOPTION.

Effect of *Kritima* adoption.

IT has already been pointed out that a *Kritima* adoption involves no change of paternity, and consequently no loss of rights in the natural family. The adopted only acquires certain rights of inheritance in his adoptive family subject to the correlative duty of presenting the funeral cake. In fact, his position is analogous to that of a child adopted by a stranger in the time of Justinian. "Such son," says an authority quoted by the *Pandits* in an old Bengal case, "offers the "funeral cake to the person who adopts him, but the "offices of presenting the funeral cake to his own father "and other relations still continues nevertheless." *Musst. Deepoo* v. *Gowree Shunker*, iii. *Sel. Rep.* 410; *Collector of Tirhoot* v. *Huropershad Mohunt*, 29 May, 1867, vii. Suth. *W. R.* 155. Moreover, since such an adoption merely creates a personal tie between the adopted and the adoptive parent, a *Kritima* son of the husband would not succeed to the wife's separate property unless she had joined in the adoption. (*Sreenarain Rai* v. *Bhyajha*, ii. *Sel. Reps.* 29.)

Does not succeed to wife's *peculium*.

Effects of *Dattaka* adoption.

The *Dattaka* adoption, on the other hand, involves a complete separation from the natural family, except that the adopted continues to labour under the same

incapacity to contract marriage within the prohibited degrees as before his adoption.[1] According to an express text of *Manu*, "a given son must never claim the family "and estate of his natural father. The funeral cake "follows the family and estate; but of him who has given "away his son the obsequies fail." (*Dattaka Mimansa*, sec. vi. ver. 6 and 7; *Dattaka Chandrika*, sec. ii. ver. 18 and 19.)

Loses all claim upon his natural family.

Vrihat Manu, however, declares, "Sons given, pur- "chased, and the rest, retain relation of *sapinda* to the "natural father, as extending to the fifth and seventh "degrees; like this, their general family, (which is) "also that of their adopter." (*Dattaka Mimansa*, sec. vi. verse 9.) "By this it is declared," says *Nanda Pandita*, "that the relation of *sapinda* in question is the "consanguineal connection only, and not connection by "the '*pinda*' or funeral cake; for, that this latter is "barred, is shown by this passage, 'of him who has given "'away his son, the obsequies fail.'"

Consanguineal connection continues.

But then, according to a text of *Vriddha Gautama*, no *sapindaship* is formed with the adoptive family; the adopted son merely acquires the state of lineage to the adopter.

No *sapindaship* with adoptive family.

It was for a long time a *vexata quæstio* whether an adopted son was entitled to succeed to the property of his adoptive father's collateral relations, although it was conceded that with respect to lineal succession the adopted and the son of the body stood on an equality. The doubt which formerly existed on the point arose in consequence of certain sages, such as *Dewala*, *Narada* and *Harita*, not including the *Dattaka*, or son given in adoption, among the first six classes of sons who were heirs to the father as well as to kinsmen; but the *Dattaka Chandrika*, a treatise, as I have elsewhere shown, of great authority, especially in Bengal, endeavours to reconcile

Adopted son inherits lineally as well as collaterally.

[1] *Narasammal* v. *Balaramcharlu*, 1 *Mad. H. C. Reps.* p. 420.

the conflicting doctrines of the text writers by referring to the distinction of the son being endued with good or bad qualities, and gives his own conclusion in favour of the doctrine, which may be said to be now universally accepted, that the adopted son inherits collaterally as well as lineally. (Sec. v. verses 22, 23.) This doctrine was conclusively established by the Privy Council in *Sumboochunder Chowdri* v. *Naraini Debia*, Suth. *P. C. Judg.* 25, and "the reason pointed out," said Baron Parke in delivering judgment, "according to Hindu law, is that "he becomes for all purposes the son of the father." In the case of *Lukhi Nath Roi* v. *Shamasoondry*, xiv. *S. D. R.* for 1858, p. 1863, the question was whether the daughter of an adopted son could inherit from her father's adoptive collaterals, and the court being satisfied upon the authorities that an adopted son was entitled to succeed both lineally and collaterally, held that having succeeded, his daughter, in Bengal, was entitled to succeed him. But the right of an adopted son to succeed to the property of *Bandus*, or cognate relations, was distinctly left open, as it was not raised in the case then before the court. So also in *Kishen Nath Roy* v. *Hurri Gobind Roy*, xv. *S. D. R. for* 1850, p. 18, it was held that the son of an adopted son was entitled to succeed collaterally as well as lineally. See also *Hubbeehur Ruhman* v. *Rashbehari Bose*, *S. D. R. for* 1860, p. 411; *Taramohan Bhuttacherjee* v. *Kripa Moyee Debia*, v. Wyman's, *H. C. Reps.* 250; and *Gokul Chand* v. *Narain Das*, i. *Dec. S. D. N. W. P. for* 1862, p. 47.

But not a *Kritima* son.

An adoption in the *Kritima* form, however, does not confer collateral heirship, as the *Kritima* relation for the purposes of inheritance extends only to the contracting parties: *Musst. Shibo Koeree* v. *Joogun Singh*, 8th July, 1867, viii. Suth. *W. R.* 155.

Dattaka son related to adoptive mother and her ancestors.

The *Dattaka* son likewise represents the real legitimate son in relationship to his adoptive mother, whose ancestry are his maternal grandsires. This is the opinion

of Sutherland,[1] and is supported by the direct authority of the *Dattaka Mimansa*, sec. 6, verse 50, and also of the *Dattaka Chandrika*, sec. 3, verse 17.[2] But here again the rule would not apply to a *Kritima* son, because *Vachaspati Misra* declares that no relation obtains between a son adopted in this form and the father of the adopter.

But not so in the case of a *Kritima* son.

It would seem, however, that even in the *Dattaka* form an adopted son is only regarded as the son of the husband and wife who join in the act of adoption, and that consequently the son adopted to one wife is no heir to the co-wife: *Kasheeshuree Debia* v. *Greesh Chunder-Lahoree*, Suth. *W. R.* for 1864, p. 71. In this case a Hindu adopted a boy as son to his second wife. The mother and adopted son survived the adoptive father, and then died. The first wife alleged that she was equally an adoptive mother, and claimed to succeed to the estate which had vested in the son. Her claim was disallowed, and the Court held that the property would go to the next heir of the son and not to the stepmother, on the ground that although an adopted son is son to both his father and mother, he is so only to that mother whose adopted son he is specially taken to be.

Adopted son no heir to co-wife.

In the case of *Tincouree Chattergee* v. *Dinonath Bannerjee*, iii. Suth. *W. R.* 49, it was ruled that an adopted son has all the rights and privileges of a son born and succeeds not only to the paternal property, but also to the *stridhun* of his adoptive mother in the absence of daughters as a son born would do. As to whether a son adopted by one wife would be looked upon as the son of a co-wife and succeed to her property, the learned judges remarked—"Though this question does not arise, we "may point out that the Hindu law of inheritance pro-

Succeeds to adoptive mother's *stridhun*.

[1] *Synopsis*, Head iv. p. 219.

[2] See, however, *post* as to adopted son's relation towards maternal grandfather.

"vides even for this case, and mentions the son of a "contemporary wife among the heirs of a woman entitled "to her stridhun." This *dictum* would seem to be directly opposed to the ruling in the case of *Kasheeshuree Debia* above cited, and Mr. Cowell seems to think that "the rule of law referred to by the Court, apparently "relates to the natural son of the co-wife, or the son "adopted by the husband to both wives."[1] Further on he says: "The decisions are not quite consistent, but "it may be that the rule is erroneous, which enables a "man, without any express permission of law, to affiliate "a son to one wife, in exclusion of the others."[2]

Does not succeed to *Bandus*.

The question was left open in *Lukhi Nath Roy* v. *Shamasoondry* whether an adopted son is entitled to the property of *Bandus*, or cognate relations, but Macnaghten clearly expresses his opinion that he is not. "It "should be observed," he says, "that a son so adopted "has no legal claim to the property of a *Bandhu* or "cognate relation; for instance, if a woman on whom "her father's estate had devolved, adopt a son with the "permission of her husband, the son so adopted will not "be entitled to such estate, on his adoptive mother's "death. It will go to her brother's son, in default of "nearer heirs. This point was determined in a case "recently decided by the Court of Sadr Dewani Adalat. "It is not quite evident why a daughter's adopted son "should be excluded from inheriting the estate of his "adopting mother's father, while a son's adopted son's "right of succeeding collaterally has been acknowledged, "inasmuch as the maternal grandfather is enumerated "among the kindred by all the Hindu legislators; *but* "*the reason is, that the party adopted in the latter case be-* "*comes the son of a person whose* lineage is distinct from "that of the maternal grandfather."[3] The case referred

Is not heir to adoptive mother's father's estate.

[1] *Tagore Law Lectures for* 1870, p. 352. [2] *Ibid.* p. 357.
[3] *Principles*, pp. 81, 82: (1871 ed.)

to by Macnaghten was that of *Gunga Mya* v. *Kishen Kishore Chodri*, iii. *Sel. Reps.* 170, in which, however, the question did not properly arise. The true reason for the adopted son's exclusion from succeeding to a maternal grandfather's estate is no doubt correctly stated by Macnaghten; for, as pointed out by Baboo *Kishen Kishore* in *Tincouree's* case, "the adopted son is adopted "into his adoptive father's family, and not into his "mother's family, and cannot perform the *shrad* of his "maternal grandfather, though he can perform that of "his adoptive mother." This doctrine has also been affirmed by a full bench decision of the Calcutta High Court in which the late Mr. Justice *Shumboonath Pandit*, one of the judges before whom the appeal was heard, made some very important observations on the general character of a Hindu adoption. Having remarked that in other respects besides this an adopted son is admittedly in a worse position than a son of the body, he proceeds:—

"If, for instance, after the adoption of a son, a son "of the body be born to the adopting father, the "adopted son obtains less than he would have got if he "also had been a son of the body; and is not, in many "other respects, treated as the eldest son of his "adopting father.

"The system of adoption is one full of injustice, and "while the adopted himself becomes the cause of dis-"appointment to others, he himself is not altogether "exempt from the possibility of his rights of inheritance "in one direction being curtailed entirely, just as well "as in being adopted, he might be a loser of his share "in a valuable ancestral estate, by his being given away "by his natural father, perhaps a rich man, for adoption "into a family comparatively indigent and poor. If this "right of an adopted son or daughter had been ever "recognized in Hindu law, then its rules regarding the "rights of the daughters to succeed to their father

" would have been worded quite differently from the " manner in which in all books they are expressed. " Some allusion to an adopted son would necessarily " have been made, just where barrenness and childless " widowhood are described as bars to their right of " inheritance.

" Allusion would also have been made where such ex- " pressions as capable of bearing children, are used. It " is quite obvious that the present wording of the law on " this subject is clearly inconsistent with the right of an " adopted son of a daughter to succeed to the estate of her " father. Besides, if an adopted son lose a part of his " rights by a son of the body being born to his adopting " parents, after his adoption, much more than an elder " brother loses by the subsequent birth to his father of " another son of the body, it is natural to suppose that " the same difference which is observed between two such " brothers, with regard to the estate of their fathers, " adoptive and natural respectively, would reasonably be " maintained with regard to their rights of succession to " the estate of the father of their mother.

" No such provision is made when the right of succes- " sion of daughter's sons is specified in all text books " and English compilations of Hindu law.

" Notwithstanding the amendment made by the late " Sudder Court upon the doctrine of the *Dayabhaga*, to " the extent of admitting the right of an adopted son to " succeed collaterally, according to the doctrines of " Manu (as explained by his best commentators), in " the family of his adopting father, it may still be an " open question whether, when two brothers, one an " adopted son, and the other the son of the body of " his father, have to inherit as brother's sons, or " brother's grandsons, the property of a kindred of " their father, they take this estate in equal, or in the " same shares in which they had taken their father's " estate. It is clear that the last mentioned argument

" is not conclusive if these brothers can, in the above " case, succeed in equal shares; and in that case the " omission of such distinction would be useless in both " cases. We do not find that we can dispose of this " question by stating as a general principle, that one may " adopt another as his own heir, and give him all his own " property, but cannot be allowed through such an act " to disinherit a *third* person from the estate of a *fourth* " individual; because an adopting father may even now " do so. When his adopted son may have a right to " claim as a nearer kinsman the estate of a brother, or " cousin, or uncle of his adopting father, to the preju- " dice of another kindred, who is distant by one degree " in descent, and who might have succeeded to the same " unopposed, if there had not been this adoption.

" The principal grounds upon which we think that the " opinion of the English compilers of Hindu law, against " the right of an adopted son to succeed to the estate of " his maternal grandfather is correct, are the fact of no " direct texts acknowledging such a right being any- " where traced, and the absence among the reported " cases of any suit in which the question directly arose.

" For aught we know, the case that we are now de- " ciding, might have arisen from a wrong understanding " of the effect of the decision of 1859 upon this point of " Hindu law, which, however, it did not attempt to " decide." *Moran Moyee Debia's* Case, S. F. B. R. 121.

Relatives of adoptive mother inherit the property of adopted son.

The decision referred to above was passed by the Sadr Dewani Adalat in the case of *Gunga Prosaud Roi* v. *Brijessuree Chowdrain*, 30th July, 1859, *S. D. R.* 1,091, and was to the effect that the relatives of the adoptive mother inherit the property of her adopted son, just as they would have succeeded to a natural born son. From this decision it may be argued, to quote again from Mr. Justice *Shamboonath's* judgment, " that if the maternal " relatives of the adopting mother stand in the position " of those relatives that they would be to the son of the

" body of the daughter of their family, and if they have a " right to succeed to the estate of this adopted son, just " as to that of a son of the daughter, why should the " adopted son himself be debarred from claiming a " similar right of inheritance himself to the estate of " these maternal relatives?" To this objection the learned judge proceeds to reply as follows:—

" Such reciprocal rights are not, however, invariably " any part of the Hindu system of succession. A man " never succeeds his own daughter; and a husband is " not invariably, to all kinds of his wife's *stridhun* pro- " perty her heir; and though to some *stridhun* of a step- " mother, a son may be heir, she can never claim any " inheritance from such a son of her husband."

Adopted son cannot be disinherited for misconduct.

An adopted son cannot be disinherited on the ground of misconduct—*Daee* v. *Motee Nuthoo*, 6th October, 1813, i Borr. 75; and so also in *Ram Surn Dass* v. *Musst. Prankoer*, 22nd May, 1865, *Agra S. D. Sel. Reps.* 293, it is ruled that insubordination to the widow of the deceased adopting father was insufficient to exclude the adopted from inheritance.

Son adopted by widow only entitled to property vested in her at time of adoption.

By adopting a son a widow immediately divests herself of her husband's estate to which she may have succeeded in default of male heirs; nor does the mere fact of her husband's estate having descended to his son deprive her of the right of exercising her power of adoption at some future period when the estate should happen to devolve upon her. But this right cannot be exercised to the prejudice of any other person in whom the husband's estate may, in the events which have happened since her husband's death, have legally vested. Thus where a Hindu died leaving a widow and an only son, who succeeded as heir and subsequently married; and on his death the mother, in opposition to the claims of his (the son's) widow, set up an adoption alleged to have been carried out by her in accordance with her late husband's written permission, the Privy Council held

that the rule of Hindu law is, that in the case of inheritance, the person to succeed must be the heir of the last full owner, who in this case was the natural son; and that accordingly by the mere gift of the power of adoption to a widow, the estate of the heir of a deceased son (his widow in the present case) could not be defeated and divested. *Bhoobun Mogee Debia* v. *Ramkishore Acharjee* x. *M. I. App.* 304. See also *Rykant Monee Roy* v. *Kisto Soonderee Roy*, vii. Suth. *W. R.* 392.

Natural rights of adopted remain unaffected if adoption is invalid.

It has been ruled by the Madras High Court that where an adoption is set aside as invalid the natural rights of the person adopted remain unaffected; and that he is therefore not entitled to claim to be maintained by the alleged adopter. "In reason and good sense," say the learned judges, "it would seem hardly "a matter for doubt that where no valid adoption—in "other words, no adoption has taken place, no claim of "right in respect of the legal relationship of adoption can "properly be enforced at law. But in this case it was "contended on the part of the plaintiff (the appellant) "that although *Kistnaji Koweri Pandit* was precluded "from all right to inherit in the family of the defen- "dant's husband, yet that by reason of the forms and "ceremonies attending an adoption having been gone "through, the law gave him the right to claim mainte- "nance from the defendant, and that such right passed to "the plaintiff as his son by a valid adoption, just as it "would have passed to his natural son. In support of "this, reference was made to Mr. Strange's *Manual*, "secs. 120 and 197; Sir Thomas Strange *Hindu Law*, "i. p. 82, and to the *Dattaka Chandrika* by Sutherland, "sec. i. cl. 14, 15, and section vi. cl. 4. Now the pas- "sages in the two former works rest upon the authority "of the *Dattaka Chandrika* and the *Mitackshara* on in- "heritance, ch. i. section xi. clause 9, and having con- "sidered what is to be found in these authorities, we "are of opinion that no legal ground is afforded for the

" present claim to maintenance. Mr. Strange in section " 119 of the second edition of his *Manual* no doubt " states broadly that a boy, after a gift made for adop- " tion, cannot be re-admitted to his family rights should " his adoption ' not stand good in law,' and that devoid " of inheritance, he has a claim to maintenance. And an " observation to the same general effect occurs in a late " judgment delivered by Mr. Strange, then a judge of " this court, in the case of *Ayyayu Muppanar* v. *Nila-* " *datchi Ammal.*[1] But Sir Thomas Strange's obser- " vations are confined to the adoption of one of a differ- " ent class from the adopter, and he puts the claim to " maintenance on the ground that such an adoption, " while it divests the child of his natural claims, does not " entitle him to all the incidents of an unexceptionable " adoption and enable him effectually to perform those " rights which are essential to the right to inherit, and " this in effect is supported by the *Dattaka Chandrika,* " section i. clauses 14, 15. Where, however, both the " author and commentators to whom he refers make the " claim of adopted sons of a different class, more ex- " pressly and distinctly to rest upon the ground, that " although not qualified to present the oblations and " perform the rights essential to inheritance, they ac- " quire a filial relationship (as is there said) ' by reason " of their being beneficial in a small degree, they only " receive maintenance.' See also the *Dattaka Mimansa,* " sec. 3.

" The doctrine so laid down treats the adoption as " one that may be made and existing, and of validity for " one of the purposes of adoption. According to *Manu,* " quoted in clause 3 of the same section, though not for " the other purpose of ' the funeral cake, water, and " ' solemn rites.' How far this doctrine now holds good " as law, we are not called upon to consider, as it has, we

[1] Vol. i. p. 45.

"think, no application to the present case. But we may "observe that there appears to be nothing in the *Mitak-* "*shara* to the same effect, and Sir Thomas Strange, in a "note to the passage before referred to, questions the "claim of maintenance and says: 'Mr. Sutherland, "'translator of the treatise on adoption, being of opinion "'that the adoption being void, the natural rights re-"'main,' and, applied to the present case, this opinion "of a very high authority upon the subject is entitled "to more weight, that it is clearly logical. If there "was no adoption nothing can have been acquired, and "therefore nothing lost."

Adopted son shares with legitimate son subsequently born.

In the event of a legitimate son being born subsequent to the adoption of a son, the Hindu law allows the former a larger share than the latter in the division of the paternal property. Under the Athenian law heirs born after the adoption could not prejudice the right of the adopted person.[1] The Hindu law on the contrary, while generally conceding to an adopted all the rights and privileges of a begotten son, in this as in some other instances, places the former in an inferior position.

Takes one-fourth according to authorities of *Benares* school.

Thus in the case of *Preeag Singh* v. *Ajoodiah Singh*, ii. Mac. *Precedents*, 184-185, the Pandits declared that in accordance with the principles of the *Mitacshara* and *Dattaka Mimansa*, authorities recognized in the *Benares* school, the property should be divided into four shares, three of which to be given to the son of the body, and the fourth to the adopted son. But in *Ayyayu Muppanar* v. *Niladatchi Ammal*, i. *M. H. C. Rep.* 45, Strange and Frere, JJ., ruled, on the authority of the *Saraswati Vilasa*, that the fourth share mentioned in the *Mitacshara* as that of an adopted son where a natural son is subsequently born, is a fourth of what the latter is to have: that is, the estate must be divided into *five* portions, of which the begotten son is entitled to four and the adopted

[1] Hermann's *Pol. Antiq. of Greece*, pp. 233, 234.

son to one. Thus the adopted son would receive only a fifth of the whole estate.[1] In Bengal the adopted son only takes one-third in the division with a legitimately begotten son, *Vyavastha Durpana,* pages 909-910. When an adopted son comes to share with heirs other than the legitimately begotten son, he takes an equal share, *Tarramohun Bhuttacharjee* v. *Kirpa Moyee Debia,* v. Suth. *W. R.* 251.

And one-third in Bengal.

With other heirs he shares equally.

[1] A similar ruling was passed by the Bombay *Sadr Adalat.* West and Bühler's *Digest of Hindu Law,* p. 43. Among *Sudras* the adopted son shares equally with the legitimate son subsequently born. *Dattaka Chandrica,* sec. v. verse 32.

CHAPTER IV.

CEREMONIES OF ADOPTION—EFFECT OF NON-OBSERVANCE—ACTUAL GIFT AND ACCEPTANCE ALONE ESSENTIAL—CONDITIONAL ADOPTION NOT SANCTIONED BY HINDU LAW—EFFECT OF PREVIOUS DECISION—LIMITATION OF SUITS CONCERNING ADOPTION.

Observance of ceremonies enjoined by text-writers.

ALL the original treatises give a minute detail of the ceremonies to be observed in effecting the adoption of a child, and both the *Dattaka Mimansa* (sec. v. verse 56) and *Dattaka Chandrika* (sec. ii. verse 13), lay down that the filial relation of adopted sons is occasioned only by the proper ceremonies. Manu also declares: "He who adopts a son without observing the "rules ordained, should make him the participator of the "rites of marriage, not a sharer of the wealth." (*Dattaka Chandrika*, sec. vi. verse 3.)

Divided into secular and religious.

The ceremonies thus enjoined may be divided into two classes, the secular and religious. The former consists in giving humble notice to the king, and inviting the father's and mother's kinsmen (*bandhus*) and relations (*sapindas*).

Secular admittedly not essential.

But these formalities, as stated in the *Sudhi-viveka*, "are for the sake of attestation and remov-"ing doubts as to the right of inheritance, and not "intended as any legal essential," Note xiii. Sutherland's *Synopsis*. This is also affirmed by *Dewanda Bhat* and *Nanda Pandita*, both of whom admit that "the

"inviting these (*i. e.*, king and kinsmen), is for the sake of witnessing" (*Dattaka Chandrika*, sec. ii. verse 6; *Dattaka Mimansa*, sec. v. verse 9). It may, therefore, be regarded as perfectly clear that the non-observance of these secular formalities would not affect the validity of an adoption.

Religious ceremonies.

As regards religious ceremonies the prevailing opinion appears to be, that although some of them may be mentioned by native writers as important in a spiritual point of view, they are not to be regarded as legally essential to the validity of an adoption. "The inadvertent omission "of an inessential part," says Colebrook, "as sacrifice "is, even where it is enjoined, does not vitiate an adop- "tion," iii. *Digest*, 126. And Mr. Ellis, another well-known Sanscrit scholar, says: "Certainly, however de- "fective the ceremony, and however small in consequence "the spiritual benefit, the act of adoption cannot be set "aside on any account whatever, *à fortiori*, not on account "of any informality." (ii. Strange, *H. L.* 126.) Macnaghten was likewise of opinion that "the exact obser- "vance of these ceremonies is not indispensable," *Principles*, page 71 (1871 ed.), note. According to *Jagannatha* adoption is the object of that act of will called acceptance, and he distinctly gives it as his opinion that it is valid without oblation to fire, though no special perfection arises. Colebrooke's *Digest*, book v. ch. iv. sec. viii. verse 273, note.

Operative part consists in the gift and acceptance.

Indeed it may be safely asserted as well established law, that the operative part of the ceremony of adoption consists in the giving away of the child by a qualified person, and in his acceptance as a son by the adopter. This was distinctly ruled in *Veerapermall Pillay* v. *Narain Pillay*,[1] and the same doctrine has since been frequently adhered to by the Superior Courts in India. Thus in *Dyamoye* v. *Rasbeharee Singh*, viii. *S. D. Dec.* 1,001, the

[1] Strange's *Notes of Cases*, 117.

majority of the judges held that a legal giving and legal taking were all that were necessary to constitute a valid adoption. "The passage," said Mr. Justice Jackson, "cited from the *Dattaka Chandrika* and *Dattaka* "*Mimansa* is to the effect that the prescribed forms "must be observed; but I conceive that refers to the "form of *giving* and *taking*, not to the subsequent per- "formance of the sacrifice by fire, the shaving of the "head, and naming the child, which may be deferred to "any period, or altogether neglected; I think these cere- "monies are not essential, and that the adoption of the "plaintiff was complete without them." So also in *Perkash Chunder Roy* v. *Dhunmonee Dossea and others*, 24 January, 1853, *S. D. A.* page 96, the adoption of a son was held to be proved on strong circumstantial evidence, in the absence of direct proof of the performance of the necessary ceremonies. It is true that in both these cases the parties were *sudras*, but the reasons on which the decisions were based are equally applicable to all classes. And in a Madras case decided in 1868, the question was distinctly raised whether, in order to establish a valid adoption in a *Brahmin* family, proof of the performance of the *datta homan* is essential; and the court held that it is not.[1] The whole of the authorities were thoroughly reviewed in this case, and the learned judges also quoted an important passage from the judgment of Lord Wymford in *Sootremgan Sutputty* v. *Soobitra Dye*, ii. Knapp. 280, in which his lordship declares that "neither written acknowledgments, nor the performance "of any religious ceremonial are essential to the validity "of adoptions." So also in *Saho Bewa and another* v. *Nuboghun Mytee*, 17 April, 1869, ix. Suth. *W. R.* 380, Jackson and Markby, JJ. held, that "when there is "satisfactory evidence showing a party to have been "*given* and *received* in adoption, and when the adoption

[1] See also *S. D. Decisions* for 1859, p. 229.

" has been continuously recognized in a series of years, " and the party adopted is shown to have had posses- " sion either in person or through his guardian, of pro- " perty which would devolve upon him by reason of such " adoption, a court may dispense with formal proof of the " performance of the ceremonies." Again in *Radhamadhub Gossain* v. *Radhabullub Gossain*, 17 September, 1862, Hay's *Reps.* 311, it was ruled that the court when satisfied that permission to adopt existed, will exact slight proof of the performance of ceremonies.

Case of *Bhyrubnath Sye* v. *Mohesh Chander* explained.

But it would seem from the reported judgment in a recent case, that two of the learned judges of the Bengal High Court (Loch and Bayley, J.J.), dissent from the doctrine that giving and receiving are sufficient to constitute a valid adoption, even in the case of *Sudras*. *Bhyrubnath Sye* v. *Mohesh Chunder Bhadooree and others*, 12th February 1870, xiii. Suth. *W. R.* 169. And the author of the *Vyavastha Durpana* contends that the rule propounded by *Jagannatha*, opposed as it is to a right construction of the passages of the *Dattaka Mimansa* and *Dattaka Chandrika*, already referred to, must be regarded as inaccurate.[1] But the decision in *Bhyrubnath's* case has been subsequently explained by one of the judges who passed it, as not being based on the necessities of the Hindu law, but only with reference to the facts of the case. " We substantially said," remarks Mr. Justice Bayley, "that it was unnecessary to go into the question " whether ceremonies were absolutely requisite or not, " because they were performed in that case, and were " referred to as having been performed." (*Nittianund Ghose* v. *Krishen Dyal Ghose*, 21st March, 1871, vii. *Beng. L. Reps.* i. App. Civil. This was the case of an adoption of a brother's son by a *sudra*, and Bayley, J. (Paul, J., concurring) held that ceremonies which are necessary to be observed for a valid adoption among

[1] *Vyavastha Durpana*, p. 874.

Hindus of the superior classes are not necessary in case of an adoption by a *sudra;* and that in the case of an adoption by a *sudra* mere giving and receiving may be sufficient to make the adoption valid. In the face of the above explanation it is impossible to lay much stress on *Bhyrubnath's* case, and even independently of this explanation, that case could hardly be accepted as sufficient to overthrow a doctrine which has been accepted as correct for half a century by all the Presidency Courts in India. The ceremonies prescribed at adoption by *Dewanda Bhat* and *Nanda Pandita* are all connected with the process of regeneration, and, no doubt, in a spiritual point of view it is most important that the ceremonies of regeneration should be performed. "But," as the learned Tagore Professor of Law points out, "the Courts "have never been in the habit of interfering with the "performance or non-performance of any portion, either "of regenerating ceremonies or of funeral obsequies. "Their performance has never been insisted upon as a "legal duty. The Courts have always inquired whether "they have been so far performed in the family of birth "as to render a child ineligible for adoption, for if they "have been so performed, there is a legal prohibition "against adopting him. But when it is authoritatively "declared that by gift alone the extinction of the filial "relation is caused, and the property of the son given "in the estate of the giver ceases; and his relation to "the family of that person is annulled, it is obvious "that the rite has held good for civil purposes; that the "transference of the boy from one family to another is "complete, and the only question remaining is as to his "*status* in the family of adoption, whether it should be "one of sonship or of slavery. That depends purely "upon the performance of ceremonial more or less con-"nected with the work of regeneration. The Courts "have always declined to supervise religious ceremonials, "or to insist in any way on their performance. They

"are left, and properly so, to the conscience of in-
"dividuals, or to the influence of the priests or of the
"opinion of the caste or community to which the parties
"belong. The weight of judicial authority has never
"been thrown into the scale to secure their observance
"or to prescribe their necessity."[1]

Gift and acceptance must be *actual*, not constructive.

The giving and receiving, however, in order to constitute a valid adoption, must be *actual*, and not merely a constructive giving and taking by the execution of deeds, the one purporting to be a gift, and the other an acceptance of the child by the parties executing the deeds; and where a father after execution of such deeds refuses to give his child for the purpose of adoption, the other party has a right to come to Court for relief, and ask to have the deeds declared void. (*Sree Narain Mitter* v. *Kishen Soonduree Dossee*, 5th March, 1869, xi. Suth. *W. R.* 196.)

No ceremonial requisite in a *Kritima* adoption.

No ceremonies are necessary to constitute a *Kritima*[2] adoption, the agreement of the parties being alone sufficient. Thus where a zemindar adopted one of his kindred by a verbal declaration in the presence of witnesses, but without any religious right or ceremony, and the person so adopted was acknowledged, after the zemindar's death, as his heir, at the obsequies, the adoption was held to be good. (*Kullian Singh* v. *Kirpa Singh*, 23rd April, 1795, 1 *Sel. Rep.* 11, new ed.)

Conditional adoption invalid.

In the case of *Ram Surn Dass* v. *Musst. Pran Koer*, 22 May, 1865, *Sel. Reps.* 193, the question was raised before the Agra Sadr Court whether a child could be adopted subject to a condition. The condition alleged in this case was that the child should be obedient to his adoptive mother, and that if he failed to act up to this

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[1] *Tagore Law Lectures* for 1870, pp. 238, 239.

[2] For an account of the causes which led to the introduction of this form of adoption in *Mithila*, the reader is referred to Colebrook's note, *Digest*, book v. ch. iv. sec. x. sl. 284.

condition he was to be excluded from inheritance. The learned judges, in delivering judgment, observed as follows: "We do not believe, and cannot find, that the "Hindu law recognizes a conditional adoption, which "appears to leave unsecured and in jeopardy the objects "contemplated by the adopting, and to involve an ele- "ment of injustice to the adopted party. Sir Thomas "Strange expressly declares,[1] that 'an adopted succeeds "'to the rights of a begotten son.' That a Hindu "adoption is permanent, 'except in the case of a *Nitya* "'*Dwyamushyayana*; nor can the adopted be deprived "'of its advantages for any cause, or upon any pretence "'that would not forfeit to a son begotten his natural "'right to inherit.' No such cause is shown in the "present case for the exclusion of the defendant from "the inheritance in suit, insubordination to the widow "of the deceased adopting father being an insufficient "one."

Effect of previous decision.

In the case of *Kanhya Lall and others* v. *Radha Churn and others*, a full bench of the Calcutta High Court ruled that a previous decision on a question of adoption, legitimacy, and such like, in an action *in personam*, is not a judgment *in rem*, nor binding upon strangers, nor even admissible as evidence against strangers. (vii. Suth. *W. R.* 338; *S. C.* iii. Wyman's *Reps.* 240.) This question is now regulated by sections 41, 42, and 43 of the Indian Evidence Act, 1872. Section 41 provides as follows:

"A final judgment, order, or decree of a competent "court, in the exercise of probate, matrimonial, admi- "ralty, or insolvency jurisdiction, which confers upon or "takes away from any person any legal character, or "which declares any person to be entitled to any such "character, or to be entitled to any specific thing, not as "against any specified person but absolutely, is rele-

[1] Chapter on Adoption.

" vant when the existence of any such legal character, " or the title of any such person to any such thing, is " relevant.

" Such judgment, order, or decree, is conclusive proof—

" That any legal character which it confers accrued " at the time when such judgment, order, or de- " cree came into operation;

" That any legal character, to which it declares any " such person to be entitled, accrued to that " person at the time when such judgment de- " clares it to have accrued to that person;

" That any legal character which it takes away from " any such person ceased at the time from which " such judgment declared that it had ceased or " should cease;

" And that anything to which it declares any per- " son to be so entitled as the property of that " person at the time from which such judgment " declares that it had been or should be his pro- " perty."

Section 42. " Judgments, orders, or decrees, other " than those mentioned in Section 41, are relevant if they " relate to matters of a public nature relevant to the " enquiry; but such judgments, orders, or decrees, are " not conclusive proof of that which they state."

Section 43. " Judgments, orders, or decrees, other " than those mentioned in Sections 40, 41, and 42, are " irrelevant, unless the existence of such judgment, order, " or decree, is a fact in issue, or is relevant under some " other provision of this Act."

Period of limitation for suits concerning adoption.

Under Article 129 of the Second Schedule of the Indian Limitation Act, 1871 (IX. of 1871), which is to come into operation throughout India from the 1st day of April, 1873, the limitation for suits to establish or set aside an adoption is twelve years; and this period is to be calculated from the date of the adoption, or (at the

option of the plaintiff) the date of the death of the adoptive father."

Section 19 of the same Act provides that "when any "person having a right to sue has, by means of fraud, "been kept from the knowledge of such right or of the "title on which it is founded, Effect of fraud.

"And where any document necessary to establish such "right has been fraudulently concealed,

"The time limited for commencing a suit

"(*a*) against the person guilty of the fraud or ac- "cessory thereto, or,

"(*b*) against any person claiming through him other- "wise than in good faith and for a valuable consideration, "shall be computed from the time when the fraud first "became known to the person injuriously affected there- "by, or, in the case of the concealed document, when "he first had the means of producing it or compelling "its production."

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